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In the

Supreme Court of the United States

October Term, 1998

BESTFOODS (formerly known as
CPC INTERNATIONAL, INC.),

Petitioner,

v

UNITED STATES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Congress, in enacting the *North American Free Trade Agreement Implementation Act*, Pub. L. 103-122, 107 Stat. 2057 (1993), intended to amend United States law by delegating to the Secretary of the Treasury the power to define what is an "article of foreign origin," for purposes of the United States' country of origin marking law, Section 304(a) of the Tariff Act of 1930, *as amended*, 19 U.S.C. § 1304(a).

2. Whether such a delegation of power to the Secretary may be *implied*, when Congress had explictly repealed such a delegation in 1938, and the *North American Free Trade Agreement Implementation Act* states that "Nothing in this Act shall be construed . . . to modify or amend any law of the United States . . . unless specifically provided for in this Act." 19 U.S.C. § 3312(a)(2).

RULE 29.6 LISTING

Pursuant to Rule 29.6 of the Rules of this Court, petitioner Bestfoods states that it has no parent company or non-wholly owned subsidiaries.

TABLE OF CONTENTS

Page

Questions Presented i

Rule 29.6 Listing ii

Table of Contents iii

Table of Authorities v

Opinions Below 1

Statement of Basis for Jurisdiction 1

Statutes Involved in the Case 1

Statement of the Case 2

A. County of Origin Marking Requirements under Section 304 of the Tariff Act 2

B. Application of the NAFTA Marking Rules to Petitioner's Merchandise 6

C. Decision of the Courts Below 8

Reasons for Granting the Writ 15

1. Congress Has Explicitly Denied the Secretary of the Treasury the Power to Prescribe Regulations Defining an "Article of Foreign Origin" for Purposes of Section 304(a) of the Tariff Act of 1930, *as amended.* 16

2. The *NAFTA Implementation Act* Did Not By Implication Amend Section 304 of the Tariff Act to Restore to the Secretary of the Treasury the Power to Define the Scope of Operation of the Country of Origin Marking Statute. 19

3. The Federal Circuit's Decision in this Case Improperly Ignores the *NAFTA Implementation Act*'s Special Prohibition Against Implied Amendment or Modification of Federal Statutes. 22

4. Customs' Regulation Is *Ultra Vires* and Not Entitled to Deference. 24

Conclusion 26

Appendix

Exhibit A - Federal Circuit's Decision and Judgment 1a

Exhibit B - Court of International Trade's Decision 13a

Exhibit C - Court of International Trade's Rehearing Decision 47a

Exhibit D - Relevant Statutory Provisions 68a

Exhibit E - United States v. Haggar Apparel Co. 85a

TABLE OF AUTHORITIES

Cases

Bestfoods (f/k/a CPC International Inc.) v. United States, 165 F.3d 1371 (Fed. Cir. 1999) 1

Bowen v. Georgetown University Hospital, 488 U.S. 204, 208 (1988) 9

CPC International Inc. v. United States, 933 F. Supp. 1093 (Ct. Int'l Trade 1996), *reh. denied*, 956 F. Supp. 1014 (Ct. Int'l Trade 1997) 1

CPC International Inc. v. United States, 896 F. Supp. 1240, (Ct. Int'l Trade 1995) 8

CPC International Inc. v. United States, 971 F. Supp. 674 (Ct. Int'l Trade 1997) 13

Chevron U.S.A. Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984) 24, 25

Chisom v. Roemer, 501 U.S. 380, 396 (1991) 15

Condo v. Sysco Corp., 1 F.3d 599, 603 (7th Cir. 1993), *cert. denied*, 510 U.S. 1110 (1994) 25

Killip v. Office of Personnel Management, 991 F.2d 1564, 1569 (Fed. Cir. 1993) 9

Kohler Co. v. Moen Inc., 12 F.3d 632, 634 (7th Cir. 1993) 25

Koru North America v. United States,
12 CIT 1120, 701 F. Supp. 229, 234
(Ct. Int'l Trade 1988) 3

Kremer v. Chemical Construction
Corp., 456 U.S. 461, 468 (1982) 21

Lyng v. Payne, 476 U.S. 926, 937
(1986) 9

McCarthy v. Madigan, 31 F.3d 293,
303 (1994), ... 23

Mercantile Nat'l Bank v. Langdeau,
371 U.S. 555, 565 (1963) 19

Meredith v. Time Ins. Co., 980 F.2d
352, 357 (5th Cir. 1993) 25

Morton v. Mancari, 417 U.S. 535, 551
(1974). 20

Regional Rail Reorganization Act
Cases, 419 U.S. 102, 133 (1974) 15, 19, 20, 21

Rodriguez v. United States, 480 U.S.
522, 523 (1987) 21

TVA v. Hill, 437 U.S. 153, 189 (1978) 21

United States v. Borden Co., 308 U.S.
188, 198-199 (1939) 19

United States v. California, 332 U.S. 19
(1947) 21

United States v. Gibson-Thomsen Co.,
Inc., 27 CCPA 267 (1940) ..... *passim*

United States v. Haggar Apparel Co.,
No. 97-2044, ___ U.S. ___ (1999) 25

United States v. Larionoff, 431 U.S.
864, 873 (1977) 9

United States v. Mersky, 361 U.S. 431, 437 (1960), ... 18

United States v. Smith, 499 U.S. 160, 172 (1990) 21

United States v. Welden, 377 U.S. 95, 103 (1964) 19

Statutes

19 U.S.C. § 1304 ..... *passim*

19 U.S.C. § 1304(a) ..... *passim*

19 U.S.C. § 3311 1

19 U.S.C. § 3312 1

19 U.S.C. § 3312(a)(2) 11, 14

19 U.S.C. § 3314 1

19 U.S.C. § 3314(a) 9

19 U.S.C. § 3314(a)(2) 19

19 U.S.C. § 3314(b) 5, 13, 14

28 U.S.C. § 1254(2) 1

28 U.S.C. § 1581(h) 8

North American Free Trade Agreement Implementation Act, Pub. L. 103-122, 107 Stat. 2057 (1993) 5

The North American Free Trade Agreement Act Statement of Administrative Action, H.R. Doc. No. 103-159, (1993). 5

Act of June 25, 1938, ch. 679, Section 3, 52 Stat. 1077. 17

Rules and Regulations

19 C.F.R. Part 102 6

19 C.F.R. § 134.35 ..... *passim*

19 C.F.R. § 134.35(a) 6, 9, 11

19 C.F.R. § 134.1(d) 24

19 C.F.R. § 134.1(g), ... 24

Treasury Decision 94-1 (1993) 6

Treasury Decision 94-4 (1994) 5

Legislative History

Cong. Rec., September 16, 1929 at S. 3647 17

H.R. Rep. No. 103 -361, pt. 1, at 18 (1993), reprinted in 1993 U.S.C.C.A.N. 2552, 2568. 23

H. Rep. 1465, 75th Cong., 3d Sess. 18

House of Representatives, on H.R. 6738, 75th Cong., 1st Sess. at 46-47, 49 17

S. Rep. No. 103-189, at 7 (1993) 10, 23

S. Rep. No. 75-429, at 2 (1929) 18

NAFTA

Annex 302.2 4

Annex 300-B 4

Annex 311 ..... 2, 4

Annex 311.1 4

Annex 311.5(b) 5

Annex 401 4

December 17, 1992, Can.-Mex.-U.S., 32 I.L.M. (1993). 4

OPINIONS BELOW

The Federal Circuit's decision was published as *Bestfoods (f/k/a CPC International Inc.) v. United States*, 165 F.3d 1371 (Fed. Cir. 1999). (1a-12a)

The Court of International Trade's decision was published *sub nom. CPC International Inc. v. United States*, 933 F. Supp. 1093 (Ct. Int'l Trade 1996) (13a-46a), *reh. denied*, 956 F. Supp. 1014 (Ct. Int'l Trade 1997) (47a-67a). The final judgment of the Court of International Trade was published at 971 F. Supp. 674 (Ct. Int'l Trade 1997).

STATEMENT OF BASIS FOR JURISDICTION

This Court has jurisdiction to issue the requested writ of *certiorari* pursuant to 28 U.S.C. § 1254(2).

STATUTES INVOLVED IN THE CASE

The following statutes and materials are reproduced in the Appendix to this petition (A.68-84):

Section 101 of the North American Free Trade Agreement Implementation Act, 19 U.S.C. § 3311;

Section 102 of the North American Free Trade Agreement Implementation Act, 19 U.S.C. § 3312;

Section 104 of the North American Free Trade Agreement Implementation Act, 19 U.S.C. § 3314;

Section 304 of the Tariff Act of 1930, *as amended*, 19 U.S.C. § 1304(a);

Annex 311 of the North American Free Trade Agreement (NAFTA).

STATEMENT OF THE CASE

A. Country of Origin Marking Requirements under Section 304 of the Tariff Act

Section 304(a) of the Tariff Act of 1930, *as amended*, 19 U.S.C. § 1304(a)(1994), requires that every "article of foreign origin" imported into the United States, or its container, be marked permanently, legibly and in a conspicuous place, so as to indicate to an "ultimate purchaser" in the United States the English name of the article's country of origin.

Imported goods are often further processed or manufactured after entering the United States. This raises the important legal issue of whether the article which emerges from such domestic processing is an "article of foreign origin" subject to Section 304(a)'s marking requirement. Stated another way, the question is whether the "ultimate purchaser" of the imported article, to whom the required origin marking must be communicated, is the person who performs the post-importation processing, or instead is the recipient of the finished good which emerges from that processing.

Congress, in enacting Section 304(a), did not define what constitutes an "article of foreign origin" subject to the marking requirement, leaving to the courts the task of

discerning Congressional intent. In the seminal case of *United States v. Gibson-Thomsen Co., Inc.*, 27 CCPA 267 (1940), the Court of Customs and Patent Appeals, discerning Congress' intent, ruled that where an imported good is processed in this country in a way which substantially transforms it into a new and different article of commerce, having a new name, character or use, the transformed article is no longer considered an "article of foreign origin" and is not subject to the marking law's requirements.[1] For nearly six decades, the courts have uniformly followed the *Gibson-Thomsen* "substantial transformation" test as the lodestar for defining the scope of Section 304's operation. Indeed, "[t]he Customs Service has incorporated the name, character or use test of *Gibson-Thomsen* in its regulations. See 19 C.F.R. § 134.35." *Koru North America v. United States*, 12 CIT 1120, 701 F. Supp. 229, 234 (Ct. Int'l Trade 1988).The relevant provision of Section 304(a) has not been amended by Congress.

[1] The *Gibson-Thomsen* court held:

> We find nothing in the statute nor its legislative history to warrant a holding that the Congress intended to require that an imported article, which is to be used in the United States as material in the manufacture of a new article having a new name, character and use and which, when so used, becomes an integral part of the new article, be so marked so as to indicate to the retail purchaser of the new article that such imported article or material was produced in a foreign country. On the contrary, we are of the opinion that Congress intended, by the provisions of section 304(a)(2), *supra*, to cover only such imported articles as do not lose their identity as such when *combined* with other articles.

27 CCPA at 273.

In 1992, the United States, Canada and Mexico signed the *North American Free Trade Agreement* ("NAFTA"), a regional trade preference pact.[2] Annex 311 of the NAFTA, which concerns "Country of Origin Marking," authorizes the Parties to "establish by January 1, 1994, rules for determining whether a good is a good of a Party ('Marking Rules') for purposes of this Annex, Annex 300-B and Annex 302.2,[3] and for such other purposes as the Parties may agree". See NAFTA Annex 311.1.[4] Nothing in NAFTA Annex 311 affirmatively obligates any of the Parties thereto to require that imported goods be marked to show a country of origin (and, indeed, the NAFTA countries maintain very different origin marking laws). However, Annex 311 does specify certain situations in which a Party must **exempt** a "good of a Party" from any marking requirements which may be contained in national laws. One such exemption, of particular relevance to the instant case, appears in Section 5(b)(viii) of NAFTA Annex 311, which requires that each NAFTA Party shall:

> (b) exempt from a country of origin marking requirement a good of another Party that --
>
> * * *

[2] December 17, 1992, Can.-Mex.-U.S., 32 I.L.M. (1993).

[3] NAFTA Annex 300-B contains special rules granting preferential market access for certain "Textile and Apparel Goods" which are produced in a NAFTA Party. NAFTA Annex 302.2 sets forth schedule for various tariff rate concessions among the Parties.

[4] Petitioner notes that the NAFTA Annex 311 Marking Rules, which define a "good of a Party" for marking and other purposes, are different from the NAFTA Annex 401 Rules of origin, which determine when an article is a NAFTA "originating" good which is entitled to receive preferential tariff treatment under the Agreement.

> (viii) is to undergo production in the territory of the importing Party by the importer, or on its behalf, in a manner that would result in the good becoming a good of the importing Party under the Marking Rules.

NAFTA Annex 311.5(b) also prescribed other exceptions which must be accorded to a "good of another Party," many of which were already contained in Section 304 of the Tariff Act. However, the marking exception required by NAFTA Annex 311.5(b)(viii) was an entirely new exception.

Congress implemented NAFTA through the *North American Free Trade Agreement Implementation Act*, Pub. L. 103-122, 107 Stat. 2057 (1993). That Act, and its accompanying *Statement of Administrative Action* (SAA),[5] authorized the promulgation of such regulations "as necessary or appropriate to implement immediately applicable U.S. obligations under the NAFTA," *see SAA, note 2 supra, at 450*, and those "necessary or appropriate to carry out the actions proposed in the statement of administrative action." 19 U.S.C. § 3314(b).

On January 3, 1994, the Secretary of the Treasury published *Treasury Decision 94-1* (59 Fed. Reg. 110), which promulgated interim *Rules for Determining the Country of Origin of a Good for Purposes of Annex 311 of the North American Free Trade Agreement*. These interim "NAFTA Marking Rules" provided that whether a product was a "good of a Party" to NAFTA was to be determined according to a series of product-specific rules based primarily on changes in the tariff classification of materials used in manufacture or

[5] *The North American Free Trade Agreement Act Statement of Administrative Action*, H.R. Doc. No. 103-159 (1993).

production of goods. See 19 C.F.R. Part 102. At about the same time, the Secretary published *Treasury Decision 94-4* (58 Fed. Reg. 69460, 69472 (December 30, 1993)), which, *inter alia*, redesignated Section 134.35 of the Customs Regulations (19 C.F.R. § 134.35) as Section 134.35**(a)** and limited the provision's scope to "*Articles other than goods of a NAFTA country.*" The Secretary also promulgated a new subsection 134.35(b) to the regulation which covered "*Goods of a NAFTA country*," and provided in part that "A good of a NAFTA country which is to be processed in the United States in a manner that would result in a good of the United States under the NAFTA Marking Rules is excepted from marking." Plainly, Section 134.35(b) implemented the United States' obligation under NAFTA Article 311.5(b)(viii).

However, by limiting Section 134.35(a) to "*Articles other than goods of a NAFTA country.*" the Secretary effectively withdrew application of the *Gibson-Thomsen* "substantial transformation" test from products made in the U.S. with the use of articles imported from NAFTA countries. Such products were only excepted from marking under Section 304(a) if their imported constituents underwent a change in tariff classification of the kind specified in the NAFTA Marking Rules.

B. Application of the NAFTA Marking Rules to Petitioner's Merchandise

In 1992, petitioner Bestfoods (formerly known as CPC International Inc.) requested a ruling from the United States Customs Service that certain peanut butter, to be produced in a Little Rock, Arkansas factory using domestic ingredients and a small quantity of imported Canadian-origin

peanut slurry, would not be subject to foreign origin marking under Section 304(a). Bestfoods submitted to Customs considerable evidence demonstrating that the addition of domestic ingredients to the Canadian slurry, plus the additional processing to be performed in the United States, effected a "substantial transformation" under the *Gibson-Thomsen* test, so that the finished peanut butter would not be an "article of foreign origin" subject to marking under the law.

On January 1, 1994 -- while the ruling request was pending before Customs -- NAFTA entered into force, pursuant to the provisions of Section 101(b) of the *North American Free Trade Agreement Implementation Act*. At about the same time, as noted above, the Secretary of the Treasury promulgated *Treasury Decision 94-4*, establishing the interim NAFTA Marking Rules, and *Treasury Decision 94-1*, which amended Section 134.35 of the Customs Regulations.

On October 25, 1994, Customs issued to petitioner *Customs Headquarters Ruling 557994*, which held that Bestfoods' peanut butter, produced in Arkansas, "must be marked to reflect Canada as the country of origin." In reaching this remarkable determination, Customs held that the "substantial transformation" test of *Gibson-Thomsen* was inapplicable, and that the sole determinant of whether the peanut butter was an "article of foreign origin" was whether the Canadian peanut slurry -- admittedly a minor component of the finished product -- had undergone a change in tariff classification of the kind specified in the NAFTA Marking Rules. Because plaintiff's imported Canadian slurry did not undergo the required tariff shift, Customs ruled that the finished product must be marked to show Canada as its country of origin.[6]

[6] Peanut butter is classified under subheading 2008.11 of the Harmonized

Petitioner then commenced this action before the United States Court of International Trade (CIT) pursuant to 28 U.S.C. § 1581(h), seeking a declaratory judgment that *Customs Headquarters Ruling 557994* was arbitrary, capricious, an abuse of discretion, and not in accordance with law.[7] Petitioner also challenged as unlawful the Secretary's amendment of 19 C.F.R. § 134.35, to the extent it limited application of the *Gibson-Thomsen* "substantial transformation" test of origin to "Articles other than goods of a NAFTA country".

C. Decisions of the Courts Below

The United States Court of International Trade (CIT), noting that this case "raises a significant issue of first

Tariff Schedule of the United States, a provision for "Peanuts (groundnuts); Peanut butter and paste." The imported Canadian-origin peanut slurry which was to be incorporated in the peanut butter was also classified under this subheading.

The NAFTA Marking rule applicable to peanut butter of HTS subheading 2008.11 requires that non-originating materials used in the production of such merchandise must undergo the following change in classification:

> A change to subheading 2008.11 from any other chapter, provided that the change is not the result of mere blanching of peanuts.

Because the Canadian-origin slurry did not undergo this change in tariff classification, Customs held that the peanut butter produced in Arkansas must be considered a product of Canada for marking purposes.

[7] The CIT held that petitioner would be irreparably harmed if required to seek judicial review of Customs' decision through a post-importation protest process, and that the case was properly entertained under the court's 28 U.S.C. § 1581(h) declaratory judgment jurisdiction. *CPC International Inc. v. United States*, 896 F. Supp. 1240, (Ct. Int'l Trade 1995).

impression concerning the country of origin marking of goods" (A.14), ruled that both *Customs Headquarters Ruling 557994*, and the Customs regulation (19 C.F.R. § 134.35(a)) which limited application of the *Gibson-Thomsen* test to articles other than goods of a NAFTA country, were "arbitrary and contrary to law." See A.13-46. In so ruling, the CIT held that Congress, in enacting the *NAFTA Implementation Act*, did not intend to abrogate the long-standing *Gibson-Thomsen* test for defining the scope of the marking statute:

> Clearly, in implementing the [NAFTA Implementation] Act, by regulations pursuant to [19 U.S.C.] § 3314(a) it was neither "necessary" nor "appropriate" for Customs to abrogate the application of *Gibson-Thomsen* for NAFTA goods pursuant to 19 C.F.R. § 134.35(a), and therefore, in issuing that interim regulation Customs contravened the intend of Congress under the Act in approving NAFTA and exceeded Customs' delegated authority.
>
> "It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." *Bowen v. Georgetown University Hospital*, 488 U.S. 204, 208 (1988). *Accord, Lyng v. Payne*, 476 U.S. 926, 937 (1986). *See also, Killip v. Office of Personnel Management*, 991 F.2d 1564, 1569 (Fed. Cir. 1993). Therefore, if regulation issued by an agency are inconsistent with the statutory authority underlying them, they are invalid. *United States v. Larionoff*, 431 U.S. 864, 873 (1977).

* * *

> Fundamentally, it must be presumed that when Congress approved the NAFTA Agreement, Congress was well aware of *Gibson-Thomsen* and the long line of judicial authority and regulations codifying the "name character and use" substantial transformation test, which had long been applied to 19 U.S.C. § 1304(a) judicially and administratively in determining whether the manufacturer or processor was the ultimate purchaser of the imported good. **Significantly, however, upon Congress' approval of the Agreement under the Implementation Act, NAFTA did not obligate the United States to replace its well-established *Gibson-Thomsen* substantial transformation test for an ultimate purchaser under § 1304(a), Congress did not do so under the Implementation Act, and Congress did not intend to delegate the authority to do so to Customs.**

A. 31-32 (emphasis added). The CIT further held that the exception from marking contemplated by Annex 311 (b)(viii) of NAFTA constituted an "*additional exemption[]* from the marking requirements of Section 304." A.32, *quoting* S. Rep. No. 103-189, at 23 (1993). In sum, the CIT concluded that:

> In approving NAFTA under the Implementation Act, Congress had no intent to overrule or abrogate the Gibson-Thomsen substantial transformation test of an ultimate purchaser

> under 19 U.S.C. § 1304(a) for NAFTA goods, did not do so expressly under the Act, and did not grant Customs authority to do so by interim regulation. Customs interim regulation § 134.35(a), purporting to abrogate the Gibson-Thomsen rule for NAFTA goods, contravenes Congressional intent, exceeds Customs' authority to promulgate regulations necessary to implement the Act, and is therefore arbitrary and otherwise not in accordance with law. Customs' [Headquarters Ruling Letter], which failed to address the Gibson-Thomsen substantial transformation factors in addition to the NAFTA exception and Marking Rules, is also arbitrary and contrary to law.

A.39.

Subsequently, the CIT denied the government's motion for rehearing. A.47-67. In so doing, the CIT focused on the special interpretative rule contained in Section 102(a)(2) of the *NAFTA Implementation Act*, which provides explicitly that "Nothing in this Act shall be construed . . . to amend or modify any law of the United States . . . unless specifically provided for in this Act," 19 U.S.C. § 3312(a)(2). The CIT held that, in authorizing the issuance of regulations to implement United States obligations under Section 5(b)(viii) of NAFTA Annex 311, Congress had not intended to empower the Secretary of the Treasury to modify the scope of application of Section 304(a) of the Tariff Act of 1930. Rather, NAFTA Annex 311.5(b)(viii) authorized for "goods of a [NAFTA] Party," a *new* exception of marking, in addition to those already provided for "articles of foreign origin" under Section 304(a):

> Importantly, there is nothing in the Agreement or the Implementation Act that suggests that a NAFTA Party may not, in addition to the new NAFTA exemption for goods to be processed in the United States so as to become a good of the United States under the marking rules, continue to enjoy any other pre-existing exception to marking under the existing law of a Party covering goods processed in the United States.

A. 53-54. The CIT further noted that Congress, in Section 207 of the *NAFTA Implementation Act*, had in fact explicitly modified Section 304(a) of the Tariff Act in several other respects which "bifurcated" the statute to provide differential treatment for NAFTA goods, and held that:

> Given the Implementation Act's bifurcating amendments of §1304, clearly if Congress had intended a similar bifurcation or disparate marking treatment for NAFTA and non-NAFTA goods in the application of the ultimate purchase provision under §1304(a), the court would expect to find at least some expression of that intent in the statute itself or at least in its legislative history. The court finds no evidence whatever of any Congressional intent that the ultimate purchaser provision in § 1304(a) be interpreted any differently for NAFTA and non-NAFTA goods, and the bifurcating amendments to other provisions of the same statute compel the conclusion that Congress intended no change in the

> application of the ultimate purchaser provision of §1304(a).

A. 59-60. The CIT remanded the case to Customs, with instructions to apply the *Gibson-Thomsen* test in determining whether petitioner's Arkansas-made peanut butter was subject to marking.[8]

On appeal, the Federal Circuit *reversed* the CIT's decision, and held that the *NAFTA Implementation Act* had effectively amended Section 304 of the Tariff Act, by implication, to authorize the Secretary of the Treasury to abrogate the *Gibson-Thomsen* test in the case of goods produced in this country using inputs which were "goods of a NAFTA country." A. 1-12. According to the Federal Circuit, this authority was derived from Section 104(b) of the *NAFTA Implementation Act*, 19 U.S.C. §3314(b), a general provision authorizing the issuance of regulations "necessary or appropriate" to carry into effect immediately applicable United States obligations under the NAFTA.

According to the Federal Circuit:

> The effect of the adoption of NAFTA is that the term "article of foreign origin" in the federal marking statuted must be construed to exclude NAFTA goods that undergo a tariff shift

[8] On remand, Customs ruled that, applying the *Gibson-Thomsen* test to petitioner's peanut butter manufacturing operations, no "substantial transformation" occurred. The CIT upheld this remand determination. *CPC International Inc. v. United States*, 971 F. Supp. 674 (Ct. Int'l Trade 1997). Petitioner appealed this determination to the Federal Circuit; however, in light of its decision holding that the Secretary had the right to displace the *Gibson-Thomsen* rule for NAFTA goods, the appellate court never reached the questions posed by that appeal.

> after importation, regardless of whether they would be considered "articles of foreign origin" under the *Gibson-Thomsen* test. In the case of NAFTA goods, Congress has thus authorized the Secretary of the Treasury to promulgate **regulations that define the term "article of foreign origin"** for NAFTA goods according to the tariff-shift methodology. Of course, **the consequence of altering the definition of "article of foreign origin" is not only to change the scope of the goods that are exempted from marking under the marking statute, but also to change the scope of the goods that are subject to the statutory marking requirements**. Thus, the effect of Congress' authorizing the Secretary of the Treasury to promulgate regulations "necessary or appropriate" to make the United States' marking rules comply with the requirements of Annex 311, *see* 19 U.S.C. § 3314(b), **was to empower the Secretary to adopt a construction of the Federal marking statute, for NAFTA goods, that was based on the tariff-shift approach instead of the *Gibson-Thomsen* approach.**

A.9 (emphasis added).

Thus, although the *NAFTA Implementation Act* provides that nothing therein shall be construed "to amend or modify any law of the United States . . . **unless specifically provided for in this Act**" (19 U.S.C. § 3312(a)(2)), the Federal Circuit held that Congress, without specific amendment, empowered the Secretary of the Treasury to make regulations

which "change the scope of the goods that are subject to the statutory marking requirements."

REASONS FOR GRANTING THE WRIT

In the national debate which preceded adoption of the *NAFTA Implementation Act*, concerns were expressed that United States participation in NAFTA might compromise national sovereignty, and change the nation's laws in unanticipated ways. To address these concerns, Congress provided, in Section 102(a)(2) of the Act, that nothing therein was to be construed to modify or amend any Federal law, unless the modification or amendment was *specifically* provided for in the statute. Yet the Federal Circuit's decision in this case reads into the Act a Congressional design to amend the scope of the marking requirement in Section 304(a) of the Tariff Act by granting to the Secretary of the Treasury the power to define what is an "article of foreign origin" for purposes of the Act.

Repeals or amendments of Federal statutes by implication are strongly disfavored. *See, e.g., Chisom v. Roemer*, 501 U.S. 380, 396 (1991); *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 133 (1974). The Federal Circuit's decision in this case is repugnant to this rule, particularly in light of the *NAFTA Implementation Act*'s explicit prohibition against construing that Act as amending or modifying any Federal statute by implication.

1. Congress Has Explicitly Denied the Secretary of the Treasury the Power to Prescribe Regulations Defining an "Article of Foreign Origin" for Purposes of Section 304(a) of the Tariff Act of 1930, *as amended.*

As originally enacted in 1930, Section 304(a) contained not one, but two, Congressional delegations of rulemaking power to the Secretary of the Treasury. The first was a broad grant of authority to make regulations pertaining to the basic requirements of the marking law. The second was a more limit grant of authority to make regulations excepting certain articles from the marking requirement.

The statute provided in pertinent part that:

> (a) Every article imported into the United States, and its immediate container, and package in which such article is imported, shall be marked, stamped, branded, or labelled in legible English words, in a conspicuous place, in such manner as to indicate the country of origin of such article, **in accordance with such regulations as the Secretary of the Treasury may prescribe**. Such marking, stamping, branding or labelling shall be as nearly indelible and permanent as the nature of the article will permit. **The Secretary of the Treasury may, by regulations prescribed hereunder, except any article from the requirement of marking, stamping, branding, or labelling** if he is satisfied that such article is incapable of being marked, stamped, branded or labelled or cannot be marked, stamped branded or

> labelled without injury, or except at an expense economically prohibitive of the importation, or that the marking, stamping, branding, or labelling of the immediate container of such article will reasonably indicate the country of origin of such article. (Emphasis added.)

The *Customs Administrative Act of 1938* [9] amended Section 304, to eliminate the Secretary's broad authority to make regulations pertaining to the statute's basic marking requirements. During Congressional debates and hearings which preceded adoption of the 1938 Act, some members of Congress expressed concern that the Secretary of the Treasury might use his broad rulemaking authority to "exercise discretion as to whether the articles shall be branded or labelled," and to make marking optional, rather than mandatory. *See Cong. Rec., September 16, 1929 at S. 3647* (colloquy between Senator Smoot and Senator Robinson of Arkansas). *See also, Customs Administrative Bill, Hearings Before the Committee on Ways & Means, House of Representatives, on H.R. 6738*, 75th Cong., 1st Sess. at 46-47, 49.

Accordingly, Congress in 1938 amended Section 304 of the Tariff Act, to repeal the first delegation of rulemaking authority to the Secretary of the Treasury. The only rulemaking authority left to the Secretary was the power to promulgate regulations prescribing the form and manner of placement of the mandatory markings. Congress indicated that its intent in repealing this authority was to

> . . . eliminate[] the question as to whether marking requirements are mandatory or discretionary by definitely making them mandatory.

[9] Act of June 25, 1938, ch. 679, Section 3, 52 Stat. 1077.

> It provides exceptions for marking requirements where such exceptions can be justified on the basis of administrative experience.

S. Rep. No. 75-429, at 2 (1929). See also H. R. Rep. 75-1465, at 7 (1929). The 1938 Act also introduced into the statute the concept of the "ultimate purchaser" to whom required markings must be communicated.

Thus, Congress in 1938 clearly reserved to itself the right to define the fundamental requirements of the marking statute and the law's scope of operation. Congress expressly repealed its delegation of authority to the Secretary to make substantive rules governing the scope of operation of Section 304(a). Shortly thereafter, the Court of Customs and Patent Appeals, considering the scope of the amended Section 304(a), issued its seminal *Gibson-Thomsen* decision, which, until this case, the courts had uniformly applied in determining whether goods produced in the United States with foreign-origin inputs were "articles of foreign origin" subject to marking.

As this Court noted in *United States v. Mersky*, 361 U.S. 431, 437 (1960), Section 304 of the Tariff Act "merely declares the range of its operation and leaves to its progeny the means to be utilized in the effectuation of its commands." Section 304(a), *as amended*, grants the Secretary of the Treasury limited authority to make rules regarding the "means to be utilized" in carrying out the marking law, but Congress has by contrast expressly denied the Secretary the power to determine "the range of its operation," reserving that power to itself.

2. The *NAFTA Implementation Act* Did Not By Implication Amend Section 304 of the Tariff Act to Restore to the Secretary of the Treasury the Power to Define the Scope of Operation of the Country of Origin Marking Statute.

The Federal Circuit erroneously concluded that, in enacting the *NAFTA Implementation Act*, Congress by implication amended Section 304 of the Tariff Act to restore to the Secretary of the Treasury the power to define what is an "article of foreign origin," and thus to define the statute's scope of operation. The Act contained no explicit modification of Section 304 for this purpose. However, the Federal Circuit *implied* that such a change had been effected by the Act's broad general grant of authority for the issuance of *regulations* necessary to carry out the United States' immediately effective obligations under NAFTA. See 19 U.S.C. § 3314(a)(2). The Federal Circuit held that the *NAFTA Implementation Act* implicitly restored to the Secretary the substantive rulemaking authority which Congress had explicitly repealed in 1938.

This Court has repeatedly held that the amendment or repeal of Federal statutes by implication is highly disfavored. *See, e.g., Regional Rail Reorganization Act Cases*, 419 U.S. 102, 133-134 (1974). See also *Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555, 565 (1963); *United States v. Borden Co.*, 308 U.S. 188, 198-199 (1939); *United States v. Welden*, 377 U.S. 95, 103 (1964) ("Amendments by implication, like repeals by implication, are not favored.")

In this case, the Court of International Trade correctly concluded that the provisions of NAFTA Annex 311, and particularly Section 5(b)(viii) thereof, did not conflict with Section 304 of the Tariff Act, as consistently interpreted by

the courts in *Gibson-Thomsen* and its progeny. Rather, the CIT concluded, NAFTA Annex 5(b)(viii) authorized a *new* exception from the marking requirements of Section 304 for NAFTA country goods which, after importation, are so processed as to undergo a change in classification of a kind specified in the Marking Rules. The CIT ruled that this exception, was *in addition to* the established *Gibson-Thomsen* "substantial transformation" exception. The Federal Circuit, however, concluded that the marking exception provided in Section 5(b)(viii) to NAFTA Annex 311 was intended by Congress to *displace* prior law, giving the Secretary of the Treasury the power to issue regulations which sweep away the *Gibson-Thomsen* rule for NAFTA goods.

Petitioner submits that the CIT correctly held that the NAFTA Annex 311 created a new exception to marking which coexists with and supplements existing exceptions to marking for NAFTA goods. As this Court noted in the *Regional Rail Reorganization Act Cases, supra*, where two statutory provisions are "capable of co-existence, it is the duty of the courts, absent a clearly- expressed congressional intention to the contrary, to regard each as effective." 419 U.S. at 133-134, quoting *Morton v. Mancari*, 417 U.S. 535, 551 (1974). Moreover this Court, quoting a lower court decision with approval, has noted that:

> A new statute will not be read as wholly or even partially amending a prior one unless there exists a "positive repungancy" between the provisions of the new and those of the old that cannot be reconciled . . . . This principle rests on a sound foundation. Presumably Congress had given serious thought to the earlier statute . . . . Before holding that the result of

> the earlier consideration has been repealed or qualified, it is reasonable for a court to insist on the legislature's using language showing that it has made a considered determination to that end. . . .

Regional Rail Reorganization Act Cases, 419 U.S. at 134. Where there has been no express repeal or modification of a law, such a change will be inferred only where there is an "irreconcilable conflict . . . from which an intent to repeal may be inferred." *Rodriguez v. United States*, 480 U.S. 522, 523 (1987); *see also Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 468 (1982); *TVA v. Hill*, 437 U.S. 153, 189 (1978).

The rule against amendment by implication applies to statutory grants of authority to government officials. *See, e.g., United States v. California*, 332 U.S. 19 (1947). Similarly, in the instant case, there was no basis to assume, as the Federal Circuit did, that the *NAFTA Implementation Act*, impliedly restored to the Secretary the broad Section 304 rulemaking authority which had been expressly revoked in 1938. The Implementation Act repealed none of the exception to marking provided for in Section 304; rather, it *added* to that statute a new and additional exception to marking for "goods of a Party" to NAFTA which undergo certain types of processing in the United States. As the Court of International Trade correctly noted, this new exception does not conflict with existing ones, but *adds* to them, and can be construed harmoniously therewith in a way which carries out the intent of NAFTA to remove, rather than create, barriers to cross-border trade. The absence of an "irreconcilable conflict" makes it incorrect to hold, as the Federal Circuit did, that the latter statute revoked or modified the earlier one. *See, e.g., United States v. Smith*, 499 U.S. 160, 172 (1990).

3. The Federal Circuit's Decision in this Case Improperly Ignores the *NAFTA Implementation Act*'s Special Prohibition Against Implied Amendment or Modification of Federal Statutes.

The Federal Circuit's holding that the *NAFTA Implementation Act* by implication conferred upon the Secretary the power to "promulgate regulations that define the term 'article of foreign origin' for NAFTA goods," for purposes of Section 304, completely overlooks Congress' clear direction, set forth in Section 102(a)(2) of that statute, that nothing in the Act shall be construed to amend or modify any law of the United States, except as "specifically provided" therein.

Congress' enactment of Section 102(a)(2) of the *NAFTA Implementation Act* was prompted by concerns that NAFTA and its implementing law not compromise United States sovereignty or be construed as changing national laws in unexpected ways. The Senate Finance Committee noted that the provisions of Section 102:

> . . . conform with and reflect the Committee's understanding that any necessary changes in Federal laws must be enacted specifically by the Congress; the NAFTA is not self-executing and therefore has no independent effect under U.S. law. The Committee is not aware that any action, aside from what is included in this bill and the Statement of Administrative Action, is necessary to implement U.S. obligations under the NAFTA. If in the future a NAFTA dispute settlement panel were to determine that a particular U.S. law was inconsistent with the NAFTA, the Congress

> would retain the full authority to determine whether or not to amend that particular law.

S. Rep. 103-189, at 7 (1993). The House Ways & Means Committee similarly indicated that the Act's ban on implied repeals or amendments of Federal statutes "is consistent with the Congressional view that necessary changes in Federal statutes should be specifically enacted, not preempted by international agreements." H.R. Rep. No. 103-361, pt. 1, at 18 (1993), *reprinted in* 1993 U.S.C.C.A.N. 2552, 2568.

The Federal Circuit's interpretation of Section 102 of the *NAFTA Implementation Act* brings its jurisprudence into conflict with that of the only other Federal Circuit court to consider the statute. In *McCarthy v. Madigan*, 31 F.3d 293, 303 (5th Cir. 1994), the Court of Appeals for the Fifth Circuit recognized that, as a consequence of Section 102, "**special interpretive maxims apply to NAFTA.**" The *McCarthy* court acknowledged that:

> . . . Section 102(a) of the NAFTA act itself expresses mandatorily that it shall not be construed to amend or modify any law of the United States "unless specifically provided for in this Act." In sum, then, the NAFTA Act is not meant to affect United States law other than "specifically provided."

By contrast, in this case, the Federal Circuit has improperly read into the Act an implied modification to Section 304(a) of the Tariff Act, in a way which changes the law's scope of application, and renders subject to marking certain goods, produced in the United States with imported materials, which had previously been excepted from marking.

Finally, it should be noted that there is no basis for the Federal Circuit's conclusion that Congress, in passing the *NAFTA Implementation Act*, and authorizing the promulgation of the NAFTA Marking Rules, intended to grant the Secretary broad power to define the term "**article of foreign origin**" as it appears in Section 304(a) of the Tariff Act. Rather, Annex 311 of NAFTA itself makes clear that the NAFTA Marking Rules define what is a "**good of a Party,**" including a **"good of an importing Party,"** not what is an "article of foreign origin." These are entirely different concepts, and they exist independently under Customs' own marking regulations. (Compare 19 C.F.R. § 134.1(d), defining "foreign origin," with 19 C.F.R. § 134.1(g), defining "good of a NAFTA Country.") Similarly, the fact that an article made in the United States in whole or in part of Canadian- or Mexican-origin inputs may not become a "good of a [NAFTA] Party," entitled to the special marking exception accorded under NAFTA Annex 311.5(b)(viii) does not mean that it is perforce an "article of foreign origin." The two concepts are entirely different under the law, and the Federal Circuit erred in conflating them.

4. Customs' Regulation Is *Ultra Vires* and Not Entitled to Deference.

From the above, it follows that the Secretary's amendment of 19 C.F.R. § 134.35, to limit the application of the *Gibson-Thomsen* test to "Articles other than goods of a NAFTA country" was adopted without Congressional authority, and so cannot withstand scrutiny as "reasonable interpretation" that "must be given deference" under this Court's analysis set forth in *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984) and most recently

applied to Customs regulations in *United States v. Haggar Apparel Co.*, No. 97-2044, ___ U.S. ___ (1999). *Chevron* directed that "[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." 463 U.S. at 843 n.9. If Congress did not intend to delegate authority to an administrative agency, "the reviewing court must interpret the statute with little deference to the agency's interpretation, for the judiciary is the final authority on issues of statutory construction." *Kohler Co. v. Moen Inc.*, 12 F.3d 632, 634 (7th Cir. 1993), *quoting Condo v. Sysco Corp.*, 1 F.3d 599, 603 (7th Cir. 1993), *cert. denied*, 510 U.S. 1110 (1994)(*citing Chevron*, 467 U.S. at 843 n.9).

"*Chevron* expressly conditions deference on some indication in the statute that Congress intended to delegate interpretive authority to the executive branch. Only in that case may we cede our traditional duty to say what the law is." *Meredith v. Time Ins. Co.*, 980 F.2d 352, 357 (5th Cir. 1993)(footnote omitted).

Congress did not delegate to the Secretary any authority to abandon the substantial transformation test under 19 U.S.C. § 1304(a); to the contrary, the legislature explicitly forbade changes to U.S. law in the absence of an express authorization. Consequently, the Secretary's amendment to 19 C.F.R. § 134.35 to render the substantial transformation test inapplicable to products of Canada was not within his authority, and is not owed *Chevron* deference.

CONCLUSION

Petitioner respectfully submits that a writ of *certiorari* to the Court of Appeals for the Federal Circuit should issue. This case presents an important question of federal law which has not been, but should be, considered and settled by this Court, regarding the relationship of NAFTA and its implementing statute to the nation's laws. If, as the Federal Circuit held, amendments to Federal laws may be inferred from a general grant of rulemaking authority to implement United States obligations under NAFTA, or from the text of NAFTA itself, Congress' clearly-expressed prohibition against implied amendments of law will be frustrated.

This case presents an opportunity for this Court to rule definitively on the relationship of NAFTA and its Implementing Act to Federal law.

The case is also of extreme importance to American commerce, since the Federal Circuit's decision, if allowed to stand, will subject American manufacturers and consumers to bifurcated, and perhaps capricious, standards for determining what is an "article of foreign origin" subject to marking under Section 304 of the Tariff Act. Manufacturers will be forced to shoulder massive costs of complying with two sets of origin rules, and the meaningfulness of origin statements communicated to "ultimate purchasers" of goods in this country will be eroded.

Because NAFTA has become an integral part of the commercial environment for American manufacturers, traders and consumers, the question of whether and when NAFTA or its Implementing Act may be considered to amend existing

laws is a matter of substantial national importance. The petition for a writ of *certiorari* should be granted.

Respectfully submitted,
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April 25, 1999

(Any footnotes trail end of each document)

98-1069, 98-1218

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BESTFOODS (formerly known as
CPC INTERNATIONAL, INC.),
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Cross Appellant.

January 25, 1999, Decided

COUNSEL: John M. Peterson, Neville, Peterson & Williams, of New York, New York, argued for plaintiff-appellant. With him on the brief were George W. Thompson, and Arthur K. Purcell.

Armando O. Bonilla, Attorney, Commercial Litigation Branch, Civil Division, U.S. Department of Justice, of Washington, DC, argued for defendant-cross appellant. With him on the brief were Frank W. Hunger, Assistant Attorney General, David M. Cohen, Director, and Jeanne E. Davidson, Assistant Director. Of counsel on the brief were David Hamill, Attorney, Office of General Counsel, U.S. Department of Treasury, of Washington, DC; and Sandra Bell, Supervisory Attorney Advisor, Office of Regulations and Rulings, U.S. Customs Service, of Washington, DC.

JUDGES: Before NEWMAN, SCHALL, and BRYSON, Circuit Judges.
OPINION BY: BRYSON

OPINION:

BRYSON, Circuit Judge.

Appellant Bestfoods, formerly known as CPC International, Inc., makes Skippy brand peanut butter. Bestfoods makes the peanut butter from peanut slurry -- a gritty, peanut-based paste -- in its processing plant in Little Rock, Arkansas. Most of the peanut slurry that is used to make peanut butter at the Little Rock plant is made in the United States, but between 10 and 40 percent of the peanut slurry is made in Canada from peanuts grown elsewhere.

In January 1993, Bestfoods sought an administrative ruling from the Customs Service that the federal marking statute, 19 U.S.C. § 1304, did not require it to mark its peanut butter to indicate that it was made in part in Canada. The marking statute provides that an article of foreign origin must "be marked in a conspicuous place . . . in such manner as to indicate to an ultimate purchaser in the United States . . . the country of origin of the article." 19 U.S.C. § 1304(a). The marking statute is not triggered simply because some of the components or ingredients of an article made in the United States are of foreign origin. On the other hand, if the article, as sold in this country, is essentially the same as when it was imported, i.e., if the article has not undergone a "substantial transformation" following its importation, the marking statute requires that the article be marked to indicate its foreign origin. See United States v. Gibson-Thomsen Co., 27 C.C.P.A. 267 (1940). The Court of Customs and Patent

Appeals in the Gibson-Thomsen case held that a product undergoes such a "substantial transformation" if, as a result of manufacturing or processing steps in this country, the imported product loses its identity and is transformed into a new product having "a new name, character and use." 27 C.C.P.A. at 273.

Bestfoods argued before Customs that the peanut slurry it imported from Canada underwent a substantial transformation, within the meaning of the Gibson-Thomsen test, when it was made into peanut butter at Bestfoods' Arkansas plant. Peanut slurry, Bestfoods argued, is a different product from peanut butter under the Gibson-Thomsen test, because it differs from peanut butter in name, character, and use. Bestfoods therefore claimed that it was the "ultimate purchaser" of the peanut slurry, within the meaning of the marking statute, and should not be required to mark its processed peanut butter in a way that would identify it as a product, in part, of Canada.

Customs rejected Bestfoods' argument and ruled that Bestfoods had to mark its peanut butter to indicate its Canadian content. In so ruling, Customs relied on regulations promulgated pursuant to the North American Free Trade Agreement (NAFTA), Dec. 17, 1992, Can.-Mex.-U.S., 32 I.L.M. 605 (1993). Those regulations, codified at 19 C.F.R. Part 102 and 19 C.F.R. § 134.35(b), employ the so-called "tariff shift" method for determining whether goods have undergone substantial transformation following their importation and therefore do not need to be marked to indicate their foreign origin. That is, the regulations provide that an article imported from a NAFTA country will be considered to have undergone a substantial transformation only if processing or manufacturing steps in this country are

sufficient to change the article's tariff classification. Because peanut slurry and peanut butter share the same tariff classification, as defined by the regulations, Customs determined that the peanut slurry did not undergo a substantial transformation when it was converted into peanut butter at the Arkansas plant. Customs therefore concluded that Bestfoods was not the "ultimate purchaser" of the Canadian peanut slurry, within the meaning of the marking statute, and that the finished peanut butter incorporating the imported peanut slurry had to be marked to reflect its Canadian origin.

Bestfoods filed an action in the Court of International Trade challenging Customs' ruling. The company argued that the 1994 NAFTA regulation was invalid to the extent that it departed from the Gibson-Thomsen "name, character, and use" test for determining whether a good had undergone a "substantial transformation" after importation.

The Court of International Trade agreed with Bestfoods' challenge to the regulation that defined the ultimate purchaser of a NAFTA good by using the tariff-shift approach. The court held that the regulation improperly abrogated the case-by-case substantial transformation test as set forth in the Gibson-Thomsen case. See CPC Int'l, Inc. v. United States, 933 F. Supp. 1093 (Ct. Int'l Trade 1996). When the NAFTA implementation legislation was passed, the court reasoned, Congress was aware of the Gibson-Thomsen test, which had long been applied to define the term "ultimate purchaser" for purposes of the marking statute. If Congress had meant for the term ultimate purchaser to be defined differently for NAFTA and non-NAFTA goods, the court explained, that intention would have been reflected in the legislation or the legislative history. The court therefore remanded the case to

Customs to determine whether, under the traditional Gibson-Thomsen test, Bestfoods would be required to mark its peanut butter.

On remand, Customs again ruled that Bestfoods had to mark its peanut butter. Under the Gibson-Thomsen test, Customs concluded, the imported peanut slurry was not substantially transformed by being processed into peanut butter, because the essential character of the finished peanut butter was imparted by the peanut slurry, part of which was of Canadian origin.

Bestfoods again sought relief from the Court of International Trade, this time arguing that Customs had misapplied the Gibson-Thomsen test. The court, however, rejected Bestfoods' argument. It held that peanut slurry is a form of peanut butter, and that the processing Bestfoods uses to convert peanut slurry into peanut butter did not alter the essential character of the product. The court also rejected Bestfoods' argument that the amount of Canadian peanut slurry that it used in making its peanut butter was not sufficient to trigger the marking requirement. Accordingly, the court upheld Customs' ruling that Bestfoods was required to mark its peanut butter in a manner indicating that it originated in part from Canada. See CPC Int'l, Inc. v. United States, 971 F. Supp. 574 (Ct. Int'l Trade 1997).

The government has appealed from the decision of the Court of International Trade holding the NAFTA regulations invalid, and Bestfoods has appealed from the court's decision holding that the Bestfoods is required to mark its peanut butter under the Gibson-Thomsen standard. Because we agree with the government that the NAFTA regulations are valid, it is unnecessary to address Bestfoods' appeal.

In response to the government's appeal, Bestfoods argues that Customs' NAFTA regulations, and 19 C.F.R. § 134.35(b) in particular, improperly jettisoned the Gibson-Thomsen "name, character, and use" test for applying the federal marking statute in favor of the tariff-shift approach. According to Bestfoods, that change constituted an impermissible regulatory amendment of a longstanding construction of the marking statute. For the reasons set forth below, we hold that the Secretary of the Treasury acted lawfully in promulgating regulations applying the tariff shift methodology to determine whether goods imported from NAFTA countries are subject to the marking requirements of 19 U.S.C § 1304(a).

I

Annex 311 of NAFTA, entitled "Country of Origin Marking," requires the parties to establish "marking rules" to govern when a party to the agreement can require an article imported from another NAFTA country to be marked to indicate the article's country of origin. See NAFTA Annex 311, PP 1, 2. The definitional provisions of Annex 311 make clear that the marking rules must employ the tariff-shift method for determining whether a particular good is a good of the exporting country or whether it has been sufficiently altered after importation to qualify as a good of the importing country. The term "ultimate purchaser" is defined to mean "the last person in the territory of an importing Party that purchases the good in the form in which it was imported," and the phrase "the form in which it was imported" is defined to mean "the condition of the good before it has undergone one of the changes in tariff classification described in the Marking Rules." NAFTA Annex 311, P 11. Annex 311 further requires each NAFTA country to exempt from any

country-of-origin marking requirement any good of another NAFTA country that "is to undergo production in the territory of the importing Party by the importer, or on its behalf, in a manner that would result in the good becoming a good of the importing Party under the Marking Rules." NAFTA Annex 311, P 5(b)(viii). The effect of that provision is to exempt an article from marking if it underwent processing in the importing country that resulted in a change in the article's tariff classification.

Congress implemented NAFTA through the NAFTA Implementation Act, Pub. L. 103-122, 107 Stat. 2057 (1993). With that Act, Congress approved NAFTA, as well as a "statement of administrative action" that was submitted with the legislation. See 19 U.S.C. § 3311(a); The North American Free Trade Agreement Act Statement of Administrative Action, H.R. Doc. No. 103-159, vol. 1, at 450 (103d Cong., 1st Sess. 1993). The statement of administrative action and the NAFTA Implementation Act authorized the promulgation of such regulations "as necessary or appropriate to implement immediately applicable U.S. obligations under the NAFTA," id. at 463, and those "necessary or appropriate to carry out the actions proposed in the statement of administrative action,"19 U.S.C. § 3314(b).

Following the enactment of the NAFTA Implementation Act, the Secretary of the Treasury promulgated regulations containing the marking rules required by NAFTA. See 19 C.F.R. Part 102 and 19 C.F.R. § 134.35(b). As a result, the regulations now treat NAFTA and non-NAFTA goods differently for purposes of the marking requirements. Subsection (a) of 19 C.F.R. § 134.35, which deals with goods from non-NAFTA countries, directs the use of the test established in the Gibson-Thomsen case to determine

whether a good has been substantially transformed following its importation and therefore need not be marked to indicate a foreign country of origin. Subsection (b) of the regulation, which applies to goods from NAFTA countries, applies the tariff-shift method to NAFTA goods. It excepts from the marking requirement those goods that are "to be processed in the United States in a manner that would result in the good becoming a good of the United States under the NAFTA Marking Rules," but otherwise requires that goods be marked to disclose the country of origin of the goods.

2

It is undisputed that Annex 311 of NAFTA required the Secretary of the Treasury to adopt marking rules, based on the tariff-shift approach, to determine when goods from NAFTA countries would be exempt from domestic marking requirements. Bestfoods argues, however, that the converse is not true. That is, Bestfoods argues that the Secretary was not authorized -- by Annex 311, the NAFTA Implementation Act, or otherwise -- to adopt the tariff-shift methodology to determine when marking requirements would be imposed. According to Bestfoods, the NAFTA marking rules have displaced the traditional Gibson-Thomsen test only insofar as there may be some goods that would have to be marked under the Gibson-Thomsen test but not under the marking rules.

The effect of adopting Bestfoods' argument would be to require Customs to exempt NAFTA goods from the statutory marking requirement if the goods would be considered goods of the United States under either the Gibson-Thomsen test or the NAFTA marking rules. Because 19 C.F.R. § 134.35(b) applies the NAFTA marking rules, and not the Gibson-Thomsen test, to determine when NAFTA goods

must be marked, Bestfoods contends that the regulation is invalid.

We reject Bestfoods' argument. The effect of the adoption of NAFTA is that the term "article of foreign origin" in the federal marking statute must be construed to exclude NAFTA goods that undergo a tariff shift after importation, regardless of whether they would be considered "articles of foreign origin" under the Gibson-Thomsen test. In the case of NAFTA goods, Congress has thus authorized the Secretary of the Treasury to promulgate regulations that define the term "article of foreign origin" for NAFTA goods according to the tariff-shift methodology. Of course, the consequence of altering the definition of "article of foreign origin" is not only to change the scope of the goods that are exempted from marking under the marking statute, but also to change the scope of the goods that are subject to the statutory marking requirements. Thus, the effect of Congress's authorizing the Secretary of the Treasury to promulgate regulations "necessary or appropriate" to make the United States' marking rules comply with the requirements of Annex 311, see 19 U.S.C. § 3314(b), was to empower the Secretary to adopt a construction of the federal marking statute, for NAFTA goods, that was based on the tariff-shift approach instead of the Gibson-Thomsen approach.

3

Although Bestfoods contends otherwise, the NAFTA marking rules and their implementing regulations do not conflict with the marking statute, because the statute does not specify what methodology must be used to determine what is an "article of foreign origin" and who is the "ultimate purchaser" of a particular imported good. In the absence of

statutory direction, the Court of Customs and Patent Appeals in Gibson-Thomsen adopted a case-by-case approach, looking to the "name, character, and use" of the goods. When the NAFTA marking rules displaced the Gibson-Thomsen approach for purposes of NAFTA goods, it was not necessary to amend the marking statute in order to effect that change, because nothing in the statute required adherence to the case-by-case approach.

Because the new regulations are not inconsistent with 19 U.S.C. § 1304, we reject Bestfoods' argument that the regulations violate the prohibitions of section 102(a) of the NAFTA Implementation Act, 19 U.S.C. § 3312(a). Section 102(a) provides that the Implementation Act shall not be construed to amend or modify existing laws by implication. The Court of International Trade interpreted that provision to mean that NAFTA did not authorize the Secretary to implement regulations altering the approach courts had used in applying the substantial transformation test before NAFTA. That reads too much into section 102(a), which simply ensures that NAFTA will not be construed as having implicitly amended or repealed any federal statute.

4

We likewise reject Bestfoods' argument that the fact that Congress amended 19 U.S.C. § 1304 in one respect, not pertinent here, indicates that it did not intend to change, or permit the Secretary of the Treasury to change, the operation of the statute in other respects. The NAFTA Implementation Act added a new subsection to 19 U.S.C. § 1304, which is now codified at 19 U.S.C. § 1304(j). That subsection made a variety of changes in the statute as it applies to NAFTA goods. Bestfoods argues that because Congress did not

include abrogation of the Gibson-Thomsen test among the provisions of subsection (j), it must not have intended to allow that change to be made.

The problem with that argument is that the new subsection contained matters for which the marking statute needed to be amended or supplemented. It did not include matters that were expected to be addressed through regulation, such as the content of the marking rules. Significantly, the new subsection did not include any reference to the exemption from marking that was required by Annex 311 for goods that underwent a tariff shift after importation. That subject was not addressed in the new subsection, presumably because it was regarded as unnecessary to amend the statute in order to put that provision of Annex 311 into effect. The same reasoning applies to the adoption of the tariff-shift methodology to define those goods falling within the marking requirement: Because a statutory amendment was not necessary to effect that change, it is not surprising or significant that the statute was not amended for that purpose.

5

Accordingly, we reverse the decision of the Court of International Trade holding the NAFTA marking rules invalid to the extent that they impose marking requirements based on a tariff-shift approach. We remand the case to the Court of International Trade to permit Bestfoods to pursue any other arguments it may have as to why it should not be required to mark its product under the applicable regulations. Because we conclude that the Treasury Department's tariff-shift regulation is valid, we find it unnecessary to consider whether Customs' ruling would be upheld under the pre-NAFTA standards for determining whether a good has undergone a

substantial transformation after its importation, as held by the Court of International Trade. We therefore vacate the judgment, which was premised on the court's conclusion that marking would be required under the pre-NAFTA "substantial transformation" test.

Each party shall bear its own costs for this appeal.

REVERSED IN PART, VACATED IN PART, AND REMANDED.

Court No. 95-02-00144

UNITED STATES COURT OF INTERNATIONAL TRADE

CPC INTERNATIONAL, INC.,
Plaintiff,

v.

UNITED STATES,
Defendant.

July 8, 1996, Decided

COUNSEL: Neville, Peterson & Williams (John M. Peterson and George W. Thompson, Esqs.), for plaintiff.

Pillsbury Madison & Sutro (Lynn L. Miller and James M. Chadwick, Esqs.) for The Pillsbury Company, amicus curiae.

Frank W. Hunger, Assistant Attorney General; David M. Cohen, Director, Commercial Litigation Branch; Jeanne E. Davidson, Assistant Director (Rhonda K. Schnare, Trial Attorney), Civil Division, U.S. Department of Justice, for defendant.

JUDGES: BEFORE: BERNARD NEWMAN, SENIOR JUDGE

OPINIONBY: BERNARD NEWMAN

OPINION: Opinion and Order of remand

NEWMAN, Senior Judge:

Introduction

This action raises a significant issue of first impression concerning the country of origin marking of goods.

CPC International, Inc. ("CPC" or "plaintiff"), a major multi-national food producer, proposes to import Canadian-origin peanut slurry[1] to be processed, together with other ingredients, in the manufacture of CPC's "Skippy" brand peanut butter. CPC requested the United States Customs Service ("Customs") to issue a preimportation ruling as to whether its finished peanut butter, containing a small amount of Canadian-origin peanut slurry, must be marked to show Canada as the country of origin pursuant to 19 U.S.C. § 1304(a).

In Headquarters Ruling Letter 557994 of October 25, 1994 ("HRL"), Customs decided the country of origin marking issue adversely to CPC's position that such marking should not be required, which ruling precipitated this action seeking preimportation judicial review.

The Pillsbury Company, another major United States food manufacturer that also imports certain food ingredients, appears in this action as amicus curiae in support of CPC.

Briefly, Customs applied its interim amendments to the Customs Regulations implementing the North American Free Trade Agreement Implementation Act of 1993, Pub. L. 103-182, 107 Stat. 2057-2225 (December 8, 1993), codified at 19 U.S.C. § 3311 et seq. See Executive Order No. 12889, 58 Fed. Reg. 69681 (December 27, 1993) ("NAFTA Implementation Act" or the "Act"). The Act approved and entered into force the North American Free Trade Agreement

("NAFTA"), effective January 1, 1994. Customs ruled that under the interim regulations, CPC's retail containers of finished peanut butter, containing but a small quantity of Canadian-origin peanut slurry, do not qualify for the exception from marking under 19 C.F.R. § 134.35(b) and the referenced NAFTA Marking Rules, 19 C.F.R. § 102.20. Applying the hierarchical analysis required by 19 C.F.R. § 102.11, Customs determined in its HRL that CPC's finished product sold at retail must be marked to show it is a "product of Canada."

Plaintiff claims that Customs acted arbitrarily and contrary to law in failing to also address whether the post-importation manufacture of peanut butter from, among other ingredients, a small portion of Canadian slurry results in "substantial transformation" of the slurry under the oft-cited United States v. Gibson-Thomsen, Co., Inc., 27 C.C.P.A. 267. C.A.D. 98 (1940) ("Gibson-Thomsen"), and accordingly, whether CPC would be the "ultimate purchaser" of the imported good under 19 U.S.C. § 1304(a), thereby exempting the finished peanut butter from country of origin marking. Hence, the court must determine whether the Gibson-Thomsen substantial transformation test of an ultimate purchaser under 19 U.S.C. § 1304(a) must, in addition to application of the NAFTA exemptions, be considered by Customs in the country of origin marking of finished goods manufactured in the United States from NAFTA goods.

This action invokes this court's jurisdiction to grant preimportation declaratory relief concerning Customs' rulings pursuant to 28 U.S.C. § 1581(h).[2] Plaintiff moves for judgment on the agency record under CIT Rule 56.1 that the HRL and NAFTA interim regulation 19 C.F.R. § 134.35(a), which limits Gibson-Thomsen to articles other than goods of

NAFTA countries, are arbitrary and contrary to law, and requests a remand of the ruling to Customs.

At the outset, defendant raised the threshold issue of jurisdiction, and moved to dismiss this action in accordance with CIT Rule 12(b)(1), claiming the court lacks jurisdiction under § 1581(h). In an opinion and order of July 24, 1995, defendant's motion to dismiss was denied. Slip Op. 95-132.

BACKGROUND

On January 14, 1992, CPC requested a preimportation ruling as to whether CPC's retail containers of "Skippy" brand peanut butter, to be manufactured at its factory in Little Rock, Arkansas in small part from Canadian-origin peanut slurry, must be marked showing Canada as the country of origin pursuant to 19 U.S.C. § 1304(a), as amended. In support of its request, CPC furnished Customs with its proposed manufacturing process,[3] and relying on the holding of the appellate court in Gibson-Thomsen, contended that such process results in a "substantial transformation" of the slurry, and accordingly, exemption from marking of the finished peanut butter as CPC would be the "ultimate purchaser" of the slurry under 19 U.S.C. § 1304(a).

In Gibson-Thomsen, the importer challenged Customs' requirement of country of origin marking for certain hairbrushes and toothbrushes made from imported wood brush blocks and toothbrush handles that were to be combined with bristles after importation into the United States to produce finished brushes. The Appellate Court found that the finished brushes were new articles of commerce, distinct from the imported wood handles, the manufacturer of the brushes was the ultimate purchaser of the

imported wood brush blocks and toothbrush handles, and therefore, the finished brushes were not subject to country of origin marking under section 1304(a):

> We find nothing in the statute nor in its legislative history to warrant a holding that the Congress intended to require that an imported article, which is to be used in the United States as a material in the manufacture of a new article having a new name, character and use, and which, when so used, becomes an integral part of the new article, be so marked as to indicate to the retail purchaser of the new article that such imported article or material was produced in a foreign country. On the contrary, we are of the opinion that the Congress intended, by the provisions of Section 304(a)(2), supra, to cover only such imported articles as do not lose their identity as such when combined with other articles.
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> * * *
>
> * * * We are of the opinion, therefore, that, at the time of their importation, the involved articles [the brush blocks and toothbrush handles] were marked "in such manner as to indicate to" the ultimate purchaser in the United States" -- the manufacturer of the toothbrushes and hairbrushes -- the country of origin -- Japan.

27 C.C.P.A. at 273 (emphasis in part in original).

The courts have consistently followed the new "name, character and use" substantial transformation test of Gibson-Thomsen in determining whether imported goods must be marked in accordance with 19 U.S.C. § 1304(a). See e.g.: Uniroyal, Inc. v. United States, 702 F.2d 1022 (Fed. Cir. 1983), aff'g 3 C.I.T. 220, 542 F. Supp. 1026 (1982); National Hand Tool Corp. v. United States, 16 C.I.T. 308 (1992); Koru North America v. United States, 12 C.I.T. 1120, 701 F. Supp. 229 (1988); Superior Wire v. United States, 11 C.I.T. 608, 669 F. Supp. 472 (1987); Ferrostaal Metals Corp. v. United States, 11 C.I.T. 470, 664 F. Supp. 535 (1987); National Juice Products Assoc. v. United States, 10 C.I.T. 48, 628 F. Supp. 978 (1986); Carlson Furniture Indus. v. United States, 65 Cust. Ct. 474, Cust. Dec. 4126 (1970); Midwood Indus., Inc. v. United States, 313 F. Supp. 951, 64 Cust. Ct. 499, Cust. Dec. 4026 (1970), appeal dismissed, 57 C.C.P.A. 141 (1970); and Grafton Spools, Ltd. v. United States, 45 Cust. Ct. 16, Cust. Dec. 2190 (1960). As observed in Tropicana Products, Inc. v. United States, 16 C.I.T. 155, 159, 789 F. Supp. 1154, 1157 (1992), "substantial transformation is a concept of major importance in administering the customs and trade laws." Plaintiff insists that the seminal Gibson-Thomsen principle, which Customs refused to consider in its HRL, remains alive and well for NAFTA as well as non-NAFTA imports.

Under the Act, 19 U.S.C. § 3311, et seq., Congress approved and entered NAFTA into force under United States law effective January 1, 1994 and the statement of administrative action proposed to implement the Agreement that was submitted to Congress on November 4, 1993. n4 Neither the Act nor the statement of administrative action suggests that there was any intent to amend 19 U.S.C. § 1304(a), except as discussed infra in connection with § 1304(a)(3)(H). The

Implementation Act, 19 U.S.C. § 3314(a)(2), delegates to the appropriate officers of the United States (i.e., Customs) authority to issue regulations necessary to implement the Act. Customs promulgated implementing interim amendments to its regulations, Treasury Decisions 94-1 and 94-4, discussed infra, effective January 1, 1994, concerning, inter alia, marking requirements and country of origin determinations - the NAFTA "Marking Rules."

On April 29, 1994, CPC's initial ruling request of January 14, 1992 was administratively closed at CPC's request. However, on June 21, 1994 - following the NAFTA Implementation Act and promulgation of new interim amendments to the Customs Regulations - CPC by letter reiterated its request for a ruling as to whether the manufacture of peanut butter in the United States would result in a "substantial transformation" of the Canadian peanut slurry, and whether on that basis CPC would be the "ultimate purchaser" of the slurry thereby exempting the finished peanut butter from marking pursuant to 19 U.S.C. § 1304(a).

Applying the NAFTA Rules of Origin, 19 C.F.R. Part 102, Subpart B, Customs employed the "hierarchical analysis" required by 19 C.F.R. § 102.11, and the interim marking regulations, 19 C.F.R. Part 134, including § 134.35(b), which regulation excepts from country of origin marking a finished good where the processing of the imported good in the United States "would result in the [finished] good becoming a good of the United States under the NAFTA Marking Rules." Inter alia, Customs ruled: "since the peanut slurry that will be imported is a good of a NAFTA country (Canada) when imported into the United States, the country of origin marking requirements of the finished peanut butter will be based on the determination of whether the processing in the United

States would cause the final product to be of United States origin pursuant to the NAFTA marking rules" (emphasis added). Continuing, Customs ruled: "the processing in the United States does not result in the peanut butter becoming a good of the United States under NAFTA Marking Rules, [and] the Section 134.35(b) exception from the marking requirement does not apply. The retail container of the finished product that reaches the ultimate purchaser must be marked to reflect Canada as the country of origin." HRL 557994 at 4.

Specifically, Customs reasoned that since the processing of the Canadian-origin peanut slurry into finished peanut butter would not result in the required change in classification or "tariff shift" under the NAFTA "Marking Rules," 19 C.F.R. §§ 102.11(a)(3) and 102.20, [5] the finished good would not be "a good of the United States"; and that the "essential character" of the finished product within the purview of § 102.11(b) is imparted by the imported and domestic peanut slurry. [6] Accordingly, based solely upon its hierarchical analysis under the interim regulations, including application of the Marking Rules, and without addressing whether or not CPC would be the ultimate purchaser of the Canadian peanut slurry under § 19 U.S.C. § 1304(a) pursuant to the substantial transformation test of Gibson-Thomsen, Customs ruled that CPC's retail containers of finished peanut butter containing Canadian-origin peanut slurry must be marked to show that the finished article is a "product of Canada". HRL 557994 at 4.

In failing to address the issue of substantial transformation raised by CPC, Customs ostensibly applied its interim regulation 19 C.F.R. § 134.35(a) that abolished the

Gibson-Thomsen rule for NAFTA goods, which is essentially the gravamen of plaintiff's complaint and request for relief.

Specifically, CPC requests a judgment holding the HRL to be arbitrary and contrary to law to the extent that, after applying the hierarchical analysis referred to above and determining that plaintiff's proposed processing of the Canadian slurry into finished peanut butter does not result in the prescribed tariff shift under the Marking Rules, as required by the exception to marking under 19 C.F.R. § 134.35(b), Customs failed or refused to additionally address whether, as an independent basis for exemption from marking, CPC would be the ultimate purchaser of the peanut slurry under the Gibson-Thomsen substantial transformation rule.

Plaintiff also seeks a declaratory judgment that 19 C.F.R. § 134.35(a) impermissibly limits Gibson-Thomsen to imports from non-NAFTA countries, and is therefore arbitrary and contrary to law. Plaintiff requests that the court remand the HRL to Customs with instructions to consider whether plaintiff's post-importation processing of the Canadian peanut slurry meets the requirements of the Gibson-Thomsen substantial transformation factors.

Amicus curiae, The Pillsbury Company, has filed briefs in support of essentially the same position and contentions urged by CPC.

DISCUSSION

I.

The key issue is whether the Congressional approval of NAFTA under the Implementation Act, including an

obligation of the Parties under NAFTA to establish rules of origin, or so-called "Marking Rules," and certain exemptions from marking specified under NAFTA Annex 311(5) (b), abrogated and replaced for NAFTA goods imported into the United States the Gibson-Thomsen substantial transformation test for determining who is the "ultimate purchaser" of goods under § 1304(a).

The court concludes:

(a) While Congress authorized issuance of regulations necessary to implement the Act (which approved NAFTA), including establishment of the Marking Rules, Congress did not intend that Customs abolish the long-standing Gibson-Thomsen substantial transformation test for the ultimate purchaser provision of § 1304(a) for NAFTA goods. Rather, Congress intended that the Appellate Court's interpretation of the ultimate purchaser provision of § 1304(a) in Gibson-Thomsen should remain in full force and effect as a case-specific test in addition to and independent of the application of the NAFTA Marking Rules and NAFTA exemptions from marking based on those rules;

(b) interim regulation § 134.35(a), purporting to abrogate the Gibson-Thomsen test for NAFTA goods, is contrary to Congressional intent under the NAFTA Implementation Act to preserve the long-standing substantial transformation test, while at the same time implementing the new NAFTA Marking Rules and NAFTA marking exemptions based on those rules;

(c) interim regulation § 134.35(a) is outside the scope of Customs' delegated authority under 19 U.S.C. § 3314 because the abrogation of Gibson-Thomsen for NAFTA goods was

not only contrary to Congressional intent to preserve the test for NAFTA goods, but was unnecessary to implement the Act and new NAFTA Marking Rules or to comply with a Party's obligations under the Agreement;

(d) while recognizing Congressional approval under the Act of establishment of Marking Rules and exemptions from marking under NAFTA Annex 311, continuity following the Act of the application of Gibson-Thomsen as an independent alternative test to application of the Marking Rules as a basis for exemption from marking avoids contravention by Customs of 19 U.S.C. § 3312(a) and 19 U.S.C. § 1304(a);

(e) based on the foregoing, the court holds that the HRL and interim regulation § 134.35(a) are arbitrary and otherwise not in accordance with law. 28 U.S.C. § 2640(d); 5 U.S.C. § 706(2)(A); National Juice Products, 10 C.I.T. at 62, 628 F. Supp. at 991.

II.

The basic statutory framework for country of origin marking, 19 U.S.C. § 1304, as amended, was unchanged by the NAFTA Implementation Act (except as indicated infra). Section 1304(a) so far as relevant, provides: "Except as hereinafter provided, every article of foreign origin (or its container, as provided in subsection (b) hereof) imported into the United States shall be marked * * * in such manner as to indicate to an ultimate purchaser in the United States the English name of the country of origin of the article." (Emphasis added.)

Section 1304(a), neither prior to nor following the Act, provided a definition of "ultimate purchaser," thus leaving the

specific implementation of the provision to administrative and judicial interpretation. Notwithstanding that identifying the "ultimate purchaser" of an imported good is a pivotal inquiry in the administration of country of origin marking pursuant to § 1304(a), it is not surprising that given the variable circumstances under which the term must be applied, Congress has never attempted to provide a definition of the term. It is plaintiff's position, and the court agrees, that the Act approving NAFTA made no change in the judicial definition of an ultimate purchaser under § 1304(a) in accordance with the Gibson-Thomsen substantial transformation test. Indeed, as stressed elsewhere in this opinion, the Implementation Act merely broadened the application of the ultimate purchaser provision under 19 U.S.C. § 1304(a)(3)(H) by amending the statute's standard of knowledge for NAFTA goods.

Illuminating the complexity of the necessary factual and legal analyses arising from the use in the statute of the term "ultimate purchaser" are the following observations by Customs:

> It is not feasible to state who will be the "ultimate purchaser" in every circumstance. Broadly stated, an "ultimate purchaser" may be defined as the last person in the United States who will receive the article in the form in which it was imported. If an imported article will be used in manufacture, the manufacturer is the "ultimate purchaser." If an article is to be sold at retail in its imported form, the purchaser at retail is the "ultimate purchaser." A person who subjects an imported article to a process which results in a substantial

> transformation of the article, even though the process may not result in a new or different article, may be an "ultimate purchaser" in certain circumstances; but if the process is merely a minor one which leaves the identity of the imported article intact, the consumer or user of the article, who purchases it after processing, will be regarded as the "ultimate purchaser."

18 Fed. Reg. 5419 (September 9, 1953). See also interim regulation 19 C.F.R. § 134.1(d) (1995) setting forth various examples of who will be the ultimate purchaser, both under a substantial transformation analysis and under the tariff shift rules.

"The country of origin marking statute was intended, inter alia, 'to facilitate consumer purchasing decisions . . .' (citation omitted). By indicating to consumers where a product was manufactured, the statute helps informed and discriminating buyers decide either to 'buy or refuse to buy [a product] . . .if such markings should influence [their] will'." (citation omitted). Koru North America v. United States, 12 C.I.T. at 1126, 701 F. Supp. at 234. See also, United States v. Friedlaender & Co., 27 C.C.P.A. 297, 302, C A.D. 104 (1940).

III.

In addition to the basic statutory framework for country of origin marking under 19 U.S.C. § 1304, the NAFTA Implementation Act, inter alia, approved Annex 311(1) under which the NAFTA Parties were to "establish by January 1, 1994, rules for determining whether a good is a good of a

Party ("Marking Rules") for purposes of this Annex" (emphasis added) and for other purposes. Further, under NAFTA Annex 311(2), the Parties could "require that a good of another Party, as determined in accordance with the Marking Rules, bear a country of origin marking, when imported into its territory, that indicates to the ultimate purchaser of that good the name of its country of origin." (Emphasis added.) However, under Annex 311(5)(b) the Parties were obligated to exempt from country of origin marking goods meeting certain conditions. Particularly pertinent to the issues in this case is the marking exemption under Annex 311(5)(b)(viii), which provides:

5. Each Party shall:

> (b) exempt from a country of origin marking requirement a good of another Party that
>
> > (viii) is to undergo production in the territory of the importing Party by the importer, or on its behalf, in a manner that would result in the good becoming a good of the importing Party under the Marking Rules.

Also, in accordance with Annex 311(5)(b)(ix), each Party was obligated to exempt from marking a good of another Party that "by reason of its character, or the circumstances of its importation, the ultimate purchaser would reasonably know its country of origin even though it is not marked" (emphasis added). For purposes of the Annex "ultimate purchaser means the last person in the territory of an importing Party that purchases the good in the form in which it was imported; * * *." Annex 311(11) (emphasis added).

The term "the form in which it was imported" means the condition of the good before it has undergone one of the changes in tariff classification described in the Marking Rules." (Emphasis added.) Id. There is no suggestion whatever in the Agreement that in addition to the exemptions listed in Annex 311(5)(b), the Parties would be precluded from continuing their existing exemptions from marking or even from providing exemptions from marking in addition to those specified in Annex 311(5)(b).

Plaintiff does not challenge the implementation by Customs of NAFTA Marking Rules for country of origin determinations or as the basis for exceptions from marking; further, plaintiff does not contest Customs' implementation of the Marking Rules in conformance with the change in tariff classification methodology. Simply put, plaintiff argues, and the court agrees, that exemptions from marking based on the Marking Rules approved by the Implementation Act did not supplant the Gibson-Thomsen judicial interpretation of "ultimate purchaser" under the basic statute, § 1304(a) in accordance with the substantial transformation test, which remains intact for NAFTA goods in addition to the marking exemptions based on the Marking Rules.

IV.

While the Act itself entered NAFTA into force as part of United States law, the provisions of the Act itself as well as NAFTA's provisions for establishment of Marking Rules and exemptions from marking were implemented by interim regulations issued by Customs pursuant to 19 U.S.C. § 3314.

Specifically, in accordance with T.D. 94-4 (59 Fed. Reg. 110, Jan. 3, 1994) Customs added a new Part 102 to Title 19 of the

Customs Regulations, which sets forth the Rules of Origin, or "Marking Rules," for determining whether an imported good is a good of a NAFTA Party. Section 102.11 sets forth the general rules for determining country of origin, whereas § 102.20 contains the specific change in tariff classification rules referenced in § 102.11 based on chapters of the Harmonized Tariff Schedule of the United States ("HTSUS").

Country of origin marking requirements for NAFTA goods and exceptions from marking were promulgated in T.D. 94-1 (58 Fed. Reg. 69460, December 30, 1993), and are set forth in interim amendments to various provisions of Title 19, Part 134, Customs Regulations, particularly § 134.35(a) and (b). Customs observed in T.D. 94-1 that the NAFTA Parties "in view of the different existing customs legal and procedural requirements * * * agreed to use a standards approach whereby agreement was reached on certain minimum principles to be reflected in each Party's regulations * * *" (emphasis added).

The genesis of § 134.35(a) and (b), the application of which is central to the issue presented, is as follows. As early as 1953, the Secretary of the Treasury amended the Customs Regulations to administratively codify the principle of Gibson-Thomsen in 19 C.F.R. § 11.8(e) (1953). T.D. 53336 (Sept. 9, 1953). In 1972, Customs renumbered the regulation as § 134.35, T.D. 72-262, 37 Fed. Reg. 20321 (Sept. 29, 1972); and as indicated infra, at the time of issuance of the HRL, the Gibson-Thomsen regulation was again renumbered as 19 C.F.R. § 134.35(a) (1994).

At the time of CPC's initial request for a ruling, 19 C.F.R. § 134.35 (1993) provided:

134.35 Articles substantially changed by manufacture

> An article used in the United States in manufacture which results in an article having a name, character, or use differing from that of the imported article, will be within the principle of the decision of the case of United States v. Gibson-Thomsen Co., Inc., 27 C.C.P.A. 267 (C.A.D. 98). Under this principle, the manufacturer or processor in the United States who converts or combines the imported article into the different article will be considered the "ultimate purchaser" of the imported article within the contemplation of Section 304(a), Tariff Act of 1930, as amended, 19 U.S.C. § 1304(a), and the article shall be excepted from marking. The outermost container of the imported article shall be marked in accord with this part.

19 C.F.R. § 134.35 (1993).

Following Congressional approval of NAFTA under the Implementation Act, the text of § 134.35 (1993), supra, was redesignated as subsection (a) and prefaced, "Articles other than goods of a NAFTA country." The new subsection (a) under § 134.35 essentially purports to abrogate for NAFTA goods the Gibson-Thomsen test of an ultimate purchaser under § 1304(a). T.D. 94-1, supra.

Subsection (b) of § 134.35, prefaced as "Goods of a NAFTA country," excepting from marking NAFTA goods to be processed in the United States which become a good of the United States pursuant to the NAFTA Marking Rules, is

predicated on NAFTA Annex 311(5)(b)(viii), which similarly is based on the Marking Rules. Unlike subsection (a) which specifically mentions the ultimate purchaser provision of § 1304(a) as construed in Gibson-Thomsen, subsection (b) makes no reference [**28] to implementing the ultimate purchaser provision of the statute or implementing the statute in any manner, and the exception reflects only an implementation of NAFTA's Annex 311(5)(b)(viii) exemption from marking based on the Marking Rules.

Plaintiff does not dispute that 134.35(b) validly implements the exemption from marking under Annex 311(5)(b)(viii), or that its finished peanut butter does not meet the prescribed change in tariff classification pursuant to the Marking Rules, 19 C.F.R. § 102.20, for the marking exception under § 134.35(b). However, plaintiff maintains that in addition to addressing the hierarchical analysis required by § 102.11 and the exception from marking under 19 C.F.R. § 134.35(b) predicated on the rules of origin under § 102.20, Customs was required to independently consider on a case-specific basis whether plaintiff's proposed processing of the slurry in the United States would meet the Gibson-Thomsen substantial transformation test. Consequently, according to plaintiff, the HRL is arbitrary and contrary to law because Customs failed to consider whether, based upon the processing of the slurry in the United States into peanut butter, plaintiff would be the "ultimate purchaser" under § 1304(a) predicated on substantial transformation of the slurry. In the same vein, plaintiff challenges the validity of 19 C.F.R. § 134.35(a) on the ground that the interim regulation impermissibly precludes the application of the Gibson-Thomsen test to NAFTA goods.

The court must agree with plaintiff's contentions. Clearly, in implementing the Act by regulations pursuant to § 3314(a) it was neither "necessary" nor "appropriate" for Customs to abrogate the application of Gibson-Thomsen for NAFTA goods pursuant to 19 C.F.R. § 134.35(a), and therefore, in issuing that interim regulation Customs contravened the intent of Congress under the Act in approving NAFTA and exceeded Customs' delegated authority.

"It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." Bowen v. Georgetown University Hospital, 488 U.S. 204, 208, 102 L. Ed. 2d 493, 109 S. Ct. 468 (1988). Accord, Lyng v. Payne, 476 U.S. 926, 937, 90 L. Ed. 2d 921, 106 S. Ct. 2333 (1986). See also, Killip v. Office of Personnel Management, 991 F.2d 1564, 1569 (Fed. Cir. 1993). Therefore, if regulations issued by an agency are inconsistent with the statutory authority underlying them, they are invalid. United States v. Larionoff, 431 U.S. 864, 873, 53 L. Ed. 2d 48, 97 S. Ct. 2150 (1977) (Department of Defense regulations that would have operated to deny enhanced reenlistment bonuses to a certain class of reenlisting servicemen contravened Congressional purpose of underlying statute and hence were held invalid).

Fundamentally, it must be presumed that when Congress approved the NAFTA Agreement, Congress was well aware of Gibson-Thomsen and the long line of judicial authority and regulations codifying the "name, character or use" substantial transformation test, which had been long applied to 19 U.S.C. § 1304(a) judicially and administratively in determining whether the manufacturer or processor was the ultimate purchaser of the imported good. Significantly, however, upon Congress' approval of the Agreement under

the Implementation Act, NAFTA did not obligate the United States to replace its well established Gibson-Thomsen substantial transformation test for an ultimate purchaser under § 1304(a), Congress did not do so under the Implementation Act, and Congress did not intend to delegate the authority to do so to Customs.

The Senate Report which accompanied the NAFTA Implementation Act suggests quite the contrary, and notes that § 207(a) of that Act "authorizes, for NAFTA-origin goods, certain additional exemptions from the marking requirements of Section 304." S. Rep. No. 103-189, 103d Cong., 1st Sess. 23 (1993). The foregoing statement in the Senate Report is obviously not dispositive, but does suggest the continued application of existing exemptions, which included the ultimate purchaser provision of § 1304(a) as construed in Gibson-Thomsen. The court must agree with plaintiff that Congress intended that the NAFTA marking exemptions under Annex 311(5)(b) based on the Marking Rules should represent a standard minimum exemption framework to which all the NAFTA Parties were obligated to adhere, which Marking Rule exemptions when implemented and applied by Customs in addition to the existing substantial transformation test of an ultimate purchaser under § 1304(a) would provide NAFTA goods with an advantageous marking exemption framework over non-NAFTA goods to which, of course, the Marking Rules do not apply.

The court must also agree with amicus' contention, citing H.R. Rep. No. 103-361, 103rd Cong., 1st Sess., Part I at 8-9 (1993), reprinted in 1993 U.S.C.C.A.N. 2558-59, that the unmistakable purpose of NAFTA is to eliminate trade barriers, not to create them. Hence, NAFTA through the Implementation Act introduced into United States law new or

additional exemptions from marking for NAFTA goods while continuing existing exceptions in full force and effect. Indeed, for NAFTA goods Congress expressly broadened the ultimate purchaser exception under 19 U.S.C. § 1304(a)(3)(H), pursuant to § 207(a)(4) of the Implementation Act, in conformity with the exemption under Annex 311(5)(b)(ix).[7] Having thus facilitated and broadened the application of the ultimate purchaser exception for NAFTA goods under § 1304(a)(3)(H), it is most unlikely that under the Implementation Act Congress intended to abolish the long-standing application of the Gibson-Thomsen substantial transformation test to the ultimate purchaser of NAFTA goods in conformance with § 1304(a). Accordingly, the court determines that interim regulation § 134.35(a) contravenes Congressional intent under the Implementation Act and is outside the scope of the agency's authority to issue regulations "necessary" to implement the Act.

V.

Citing 19 U.S.C. § 3312(a),[8] plaintiff argues against any application to plaintiff of the NAFTA Marking Rules or exemptions from marking under Annex 311 in a manner that would eliminate the existing judicial interpretation of the ultimate purchaser provision under § 1304(a). In essence, plaintiff argues that denial of an exemption from marking based solely on consideration of the interim regulations, including the Marking Rules, would be inconsistent with § 1304(a) unless Customs gives due consideration on a case-specific basis to whether manufacture of the peanut butter in the United States results in substantial transformation of the Canadian slurry under the Gibson-Thomsen factors, and hence whether plaintiff is the ultimate purchaser of the slurry within the purview of §

1304(a). Such inconsistency results from the fact that unlike the tariff shift approach of the Marking Rules in the application of 19 C.F.R. § 134.35(b), "to determine whether a substantial transformation of an article has occurred for purpose of ascertaining who is the 'ultimate purchaser' each case must be decided on its own particular facts," Uniroyal, Inc., 3 C.I.T. 220, 224, 542 F. Supp. 1026, 1029, and must be based on the totality of the evidence. Ferrostaal Metals, 664 F. Supp. at 541. As observed in Koru, 701 F. Supp. at 234, n.9, "the plethora of tests results from the cases on substantial transformation being 'very product specific and . . . often distinguishable on that basis, rather than by their statutory underpinnings.' Courts have not adhered rigidly to a single test [to yield a substantial transformation] because of 'the importance of focusing on the facts of each case'. * * * Courts find it 'difficult to take concepts applicable to products such as textiles and apply them to combinations of liquids or fabrication of steel articles." (citations omitted.) (emphasis added.) [9]

Plaintiff further points up the prohibition under § 3312(a) that nothing in the Act shall be construed to amend or modify existing law of the United States, "unless specifically provided for in this Act." Significantly, when Congress under the Implementation Act intended to amend or modify § 1304, it did so expressly, as in § 207(a)(4), which by adding subsection (h) to § 1304 broadened the standard of knowledge for the ultimate purchaser under the marking exception in 19 U.S.C. § 1304(a)(3)(H). However, nothing in the Implementation Act suggests that Congress intended to amend to amend § 1304(a) for NAFTA goods by replacing the Gibson-Thomsen rule for determining whether the manufacturer or processor is the ultimate purchaser of the imported article. Defendant, apparently recognizing the

difficulty of its position in light of the § 3312(a) constraints on the impact of the Agreement and the Act on existing law if the tariff shift methodology were applied in a manner inconsistent with the case-specific "name, character, and use" substantial transformation test of Gibson-Thomsen, goes to great lengths to rationalize that the tariff shift concept is not a replacement of the traditional substantial transformation rule, but is really nothing more than a "reflection" or "codification" of the rule.[10]

However, it is quite apparent to the court that the Gibson-Thomsen substantial transformation test of an ultimate purchaser under § 1304(a) is indisputedly so methodologically distinct from the change in classification format of the Marking Rules applied under § 134.35(b) as to make a mockery of the use of the term "codification." In any event, whether or not the term "codified" is the apt term to apply to the affect of the tariff shift rules on the Gibson-Thomsen test, Congress expressly intended under 19 U.S.C. § 3312(a) to avoid a conflicting application of NAFTA or the Act with existing United States law, except where the Act expressly amends or modifies the existing law.

Unless the potentially conflicting methodologies may coexist and traditional substantial transformation be applied to NAFTA goods in addition to and independently of the tariff shift rules, the latter may run afoul of the Act's prohibitions under 19 U.S.C. § 3312(a).

In point of fact, Customs itself has frequently had occasion to contrast traditional substantial transformation with the change in classification concept. For example, at the time Customs published the interim NAFTA Marking Rules, the agency also issued a Notice of Proposed Rulemaking in which it

proposed to adopt the NAFTA Marking Rules under 19 C.F.R. 102 as a universal country of origin regulation, to govern origin determinations for all goods from all foreign sources. 59 Fed. Reg. 141 (Jan. 3, 1994). Customs at that time proposed amending 19 C.F.R. § 134.35 to completely eliminate the Gibson-Thomsen test as an exception to marking, and to instead provide that the goods would be exempt from marking only if, by reason of post-importation manufacturing or processing, they became a "good of the importing Party" pursuant to the NAFTA Marking Rules. In its proposal to adopt the NAFTA Marking Rules as a universal country of origin regimen, Customs observed:

> Notwithstanding the long history of the substantial transformation rule, its administration has not been without problems. These problems devolve from the fact that application of the substantial transformation rule is on a case-by-case basis and often involves subjective judgments as to what constitutes a new and different article or as to whether processing has resulted in a new name, character and use * * * The very fact that the substantial transformation rule has been the subject of a large number of judicial and administrative determinations is testament to the basic problems: the case-by-case approach, involving application of the rule based on specific sets of facts, has led to varied case-specific interpretations of the basic rule, resulting in a lack of predictability which in turn has engendered a significant degree of uncertainty, both within Customs and in the trade community as regards the effect that a

> particular type of processing should have an origin determination.
>
> * * *
>
> The change in tariff classification standard was specifically developed as an alternative to the traditional substantial transformation rule in order to obviate the problems described above. Customs believes that rules based upon the change in tariff classification approach, would provide by virtue of their greater specificity, more objectivity, transparency, and predictability in origin determinations. * * *

59 Fed. Reg. 141, 142.

That traditional substantial transformation and the tariff shift rules[11] stand as separate, independent methodologies even under the Marking Rules, is pointed up by certain rules of origin under 19 C.F.R. § 102.20 wherein Customs by administrative choice uses a dual approach requiring that the prescribed tariff shift must also result in a substantial transformation. For purposes of such rules, "substantial transformation" is, not surprisingly, defined in 19 C.F.R. § 102.1(p) to mean "production which results in a new and different article, with a new name, character and use." Hence, under § 102.20 for certain HTSUS chapters, Customs must apply traditional substantial transformation in addition to specific tariff shifts.[12]

The Marking Rules' requirement that certain tariff shifts must also result in substantial transformation in the traditional sense underscores the significant distinction in the two

approaches, and at the same time highlights the apparent recognition by Customs of the desirability or necessity for, in addition to the change in tariff classification concept, applying the traditional substantial transformation methodology under existing law for certain products. Surely, then, it is inconsistent with existing law and Customs' own dual tariff shift/substantial transformation approach under certain Marking Rules, as described above, for Customs to have otherwise abrogated the application of the traditional Gibson-Thomsen substantial transformation approach for NAFTA goods under § 134.35(a) and now assert to the court that the NAFTA rules "codify" such approach.

VI.

Plaintiff's initial memorandum of law sought an exception from marking under the "ultimate purchaser" provision of 19 U.S.C. § 1304(a)(3)(H) and § 1304(h) based on Gibson-Thomsen. The Government replied, correctly, that Gibson-Thomsen did not construe § 1304(a)(3)(H), but rather § 1304(a), and in any event the ultimate purchaser of the slurry for purposes of § 1304(a)(3)(H) would be the retail consumer of the finished peanut butter, not CPC.

In its reply brief and at oral argument plaintiff withdrew its claim for an exception from marking as the ultimate purchaser under 19 U.S.C. § 1304(a)(3)(H), and instead focused the substantial transformation test under the principle of Gibson-Thomsen on the ultimate purchaser provision of § 1304(a). As previously indicated, under the Gibson-Thomsen rule, if imported materials are processed into a finished article, resulting in substantial transformation of the imported good, the finished good is exempt from country of origin marking because the manufacturer is the "ultimate purchaser"

of the imported good within the purview of § 1304(a). Further, plaintiff, who proposes to manufacture peanut butter from imported slurry, makes no claim for an ultimate purchaser exception to marking under § 1304(a)(3)(H) based on whether the retail purchaser of the finished peanut butter meets the standard of knowledge under § 1304(h).

CONCLUSION

In approving NAFTA under the Implementation Act, Congress had no intent to overrule or abrogate the Gibson-Thomsen substantial transformation test of an ultimate purchaser under 19 U.S.C. § 1304(a) for NAFTA goods, did not do so expressly under the Act, and did not grant Customs authority to do so by interim regulation. Customs' interim regulation § 134.35(a), purporting to abrogate the Gibson-Thomsen rule for NAFTA goods, contravenes Congressional intent, exceeds Customs' authority to promulgate regulations necessary to implement the Act, and therefore is arbitrary and otherwise not in accordance with law. Customs' HRL, which failed to address the Gibson-Thomsen substantial transformation factors in addition to the NAFTA exception and Marking Rules, is also arbitrary and contrary to law.

In view of the foregoing conclusions, the HRL is remanded to Customs for consideration of whether plaintiff would be the ultimate purchaser of the Canadian slurry under 19 U.S.C. § 1304(a) in accordance with the Gibson-Thomsen substantial transformation factors.

Customs shall submit the results of remand to the court and serve counsel for the respective parties within forty-five (45) days of the service of this order. Plaintiff and amicus may

respond to the remand results within thirty (30) days of issuance; defendant may reply to such response within thirty (30) days of service.

Dated: New York, New York

July 8, 1996

Bernard Newman, Senior Judge

Footnotes

[1] "Peanut slurry" is a gritty paste made from shelled peanuts that have been roasted, blanched, split and ground.

[2] The basis of the court's exclusive jurisdiction, 28 U.S.C. § 1581(h), reads:

> (h) The Court of International Trade shall have exclusive jurisdiction of any civil action commenced to review, prior to the importation of the goods involved, a ruling issued by the Secretary of the Treasury, or a refusal to issue or change such a ruling, relating to classification, valuation, rate of duty, marking, restricted merchandise, entry requirements, drawbacks, vessel repairs, or similar matters, but only if the party commencing the civil action demonstrates to the court that he would be irreparably harmed unless given an opportunity to obtain judicial review prior to such importation. [Emphasis added.]

[3] According to CPC, in its request for a ruling it informed Customs that CPC proposes to import Canadian-origin peanut slurry, which following importation a small portion would be blended with slurry made from United States origin peanuts and combined with other domestic ingredients, all of which would then undergo certain manufacturing processes that cause the slurry, both imported and domestic, to acquire significant new commercial attributes in the form of the finished consumer-ready peanut butter. CPC further represented that its post-importation manufacturing operations, to be conducted at plaintiff's manufacturing facility in Little Rock, Arkansas, would result in a change of name, character and use of the slurry (viz., a "substantial transformation"), which would constitute CPC as the "ultimate purchaser" of the imported slurry under 19 U.S.C. § 1304(a) and the principle of Gibson-Thomsen.

Defendant has neither conceded nor denied that plaintiff's manufacturing process, as described, results in "substantial transformation" under the Gibson-Thomsen test, which is a mixed question of fact and law that the court is not required to decide at this juncture.

[4] On December 17, 1992, the United States, Canada, and Mexico signed the North American Free Trade Agreement, a trilateral trade preference. The President concluded NAFTA under authority conferred by Congress in the Omnibus Trade and Competitiveness Act of 1988, Pub. L. 100-418, 102 Stat. 1107-1574. See 19 U.S.C. § 2901. United States obligations under NAFTA were implemented in national law by the North American Free Trade Agreement Implementation Act of 1993, Pub. L. 103-182, 107 Stat. 2057-2225 (1993).

[5] With respect to peanut butter, which is classified in heading 2008.11, HTSUS, the applicable interim NAFTA Marking Rule requires the following change in classification:

> 2008.11 A change to subheading 2008.11 from any other chapter, provided that the change is not the result of mere blanching of nuts.

Customs ruled that Canadian peanut slurry is classifiable under subheading 2008.11.90, HTSUS, and the finished peanut butter is classifiable under subheading 2008.11.10, HTSUS, and hence the "tariff shift" requirements for subheading 2008.11 are not met. This aspect of the HRL is not contested by plaintiff.

[6] Customs determined that since none of the provisions of § 102.11(a) yields a country of origin determination, including a change in tariff classification under § 102.20, Customs was then required as part of the required hierarchical analysis under the Rules of Origin to invoke the provisions of § 102.11(b), which focus on the single material that imparts the "essential character" of the good to determine the country of origin. Section 102.18(b) (2) provides that only materials (domestic and foreign) that do not undergo a tariff shift are to be taken into consideration in determining the essential character of a good and that the imported and domestic peanut slurry impart the essential character of the finished peanut butter. Plaintiff does not contest Customs' determination that the peanut slurry (domestic and foreign) impart the essential character to the finished peanut butter.

[7] As aptly pointed out by amicus, marking requirements constitute one barrier to trade that Congress specifically

intended to ameliorate under the Implementation Act by expressly amending 19 U.S.C. § 1304(a)(3)(H) thus broadening the standard of knowledge respecting the "ultimate purchaser," thus adding subsection (h) to the basic marking statute. This amendment aimed at broadening the application of the § 1304(a)(3)(H) ultimate purchaser exception from marking of NAFTA goods is the direct antithesis of any Congressional intent to abrogate for NAFTA goods the ultimate purchaser exemption under § 1304(a) based on the Gibson-Thomsen substantial transformation test.

[8] So far as pertinent, that provision of the NAFTA Implementation Act reads:

§ 1312. Relationship of the Agreement to United States and State Law

(a) Relationship of Agreement to United States law

(1) United States law to prevail in Conflict

> No provision of the Agreement, nor the application of any such provision to any person or circumstance, which is inconsistent with any law of the United States shall have effect.

(2) Construction

Nothing in this Act shall be construed--

> (A) to amend or modify any law of the United States * * * unless specifically provided for in this Act.

[9] An analysis of the case law reveals that the courts have applied several tests under the rubric of "substantial transformation." Of course, the most significant is the "name, character, or use" test. Koru North America, 12 C.I.T. at 1126, 701 F. Supp. at 234, citing Anheuser-Busch Brewing Ass'n v. United States, 207 U.S. 556, 52 L. Ed. 336, 28 S. Ct. 204 (1907) and Gibson-Thomsen. Koru notes that three other tests are manifest from caselaw: (1) the "article of commerce" test; (2) the "essence" test; and (3) the "value added" test. See 701 F. Supp. at 234, n.9 and cases cited. It is also noteworthy that in Gibson-Thomsen, 27 C.C.P.A. at 273, the court held that substantial transformation occurs when an article acquires a "new name, character, and use." (emphasis added.) Even this test has long been liberalized by the courts and administratively applied more flexibly by requiring a "new name, character, or use." Koru, 12 C.I.T. at 1126, 701 F. Supp. at 234.

[10] Thus, defendant emphasizes that on May 5, 1995 Customs published in the Federal Register specific examples of the process by which judicial decisions concerning substantial transformation were taken into account in establishing the tariff shift rules. 60 Fed. Reg. 22312, 22314-22330 (May 5, 1995). Further, defendant stresses that the new Marking Rules are intended to "provide the results that would be reached under the case-by-case application of the substantial transformation rule * * *." 59 Fed. Reg. 141, 142 (January 3, 1994). On the other hand, in T.D. 94-4 Customs disclosed that the tariff shift concept "was specifically developed as an alternative to the traditional substantial transformation rule" in order to obviate various problems in origin determinations and is intended to eliminate the difficulties encountered in the "case-specific" criteria imposed by substantial transformation.

[11] In that regard, plaintiff cites examples of obvious substantial transformations of goods into new articles having a new name, character and use, that would nonetheless fail the tariff shift test, leading to absurd results. Fundamentally, statutory interpretation should avoid reaching absurd results, as presumably Congress would not have intended such results. Amicua also devotes a substantial portion of its memorandum of law to illustrate the internal inconsistency, disparate, arbitrary, and anomalous results reached under the Marking Rules and hierarchy set out in 19 C.F.R. § 102.11 for certain food products, other than peanut butter, resulting from the disregard of substantial transformation and reliance solely on prescribed tariff shifts. As previously noted, even when applying the traditional methodology, the courts have employed a plethora of substantial transformation formats under case-specific analyses to achieve a rational flexibility and to avoid reaching absurd results with regard to certain products. It is apparent that the rigidity of the change in classification concept of the Marking Rules, as expeditious and efficient as that approach may be for origin determinations, may produce results as anomalous as a rigid application of the traditional "name, character, and use" test regardless of the product.

[12] For example, the NAFTA Marking Rule for HTS heading 1901.90 requires: A change to subheading 1901.90 from any other heading, or; a change to a product of subheading 1901.90 from any other product within heading 19.01 if that change results in a substantial transformation. (Emphasis added.) Additionally, Customs has prescribed certain other tariff shifts under the Marking Rules that must constitute a traditional substantial transformation, including HTS headings 2103.90, 4823.20 through 4823.59, 4823.70 through 4823.90, 6811.90, 6812.90, 6814.90, 7010 through 7018,

7019.90, 7020, 8708.99, 9010, 9401.90, 9403.90 and 9606.21 through 9606.29. 19 C.F.R. § 102.20.

Interestingly, Customs may have second thoughts concerning the continued use of traditional substantial transformation for its NAFTA rules of origin. See Notice of Proposed Rulemaking, 60 Fed. Reg. 22312 (May 5, 1995).

Court No. 95-02-00144

UNITED STATES COURT OF INTERNATIONAL TRADE

CPC INTERNATIONAL, INC.,
Plaintiff,

v.

UNITED STATES,
Defendant.

January 6, 1996, Decided

COUNSEL: Neville, Peterson, & Williams (John M. Peterson, George W. Thompson, Arthur K. Purcell & James A. Marino, Esqs.), for plaintiff.

Pillsbury Madison & Sutro (Lynn L. Miller, Esq.) for The Pillsbury Company, amicus curiae.

Hogan & Harson, L.L.P. (Timothy C. Stanceu and Scott M. Deutchman, Esqs.) for Grocery Manufacturers of America, Inc., amicus curiae.

Frank W. Hunger, Assistant Attorney General; David M. Cohen, Director, Commercial Litigation Branch; Jeanne E. Davidson, Assistant Director (Rhonda K. Schnare and Jeffrey M. Telep, Esqs.), Civil Division, U.S. Department of Justice, for defendant.

JUDGES: BEFORE: BERNARD NEWMAN, SENIOR JUDGE

OPINIONBY: BERNARD NEWMAN

OPINION: Opinion and Order on Defendant's Motion for Rehearing

NEWMAN, Senior Judge:

INTRODUCTION

In this review of Headquarters Ruling Letter 557994 of October 25, 1994 ("HRL"), a preimportation ruling by the United States Customs Service ("Customs") reviewable by this court under 28 U.S.C. § 1581(h), defendant moves for rehearing of the court's order of remand of July 8, 1996, and reconsideration of the court's opinion, CPC International, Inc. v. United States, 933 F. Supp. 1093 (CIT 1996), pursuant to CIT Rule 59(a).

In January 1992, CPC sought a preimportation ruling from Customs that CPC would be the "ultimate purchaser" of Canadian-origin peanut slurry within the purview of the country of origin marking statute, 19 U.S.C. § 1304(a), as amended (§ 1304(a)), so that CPC's finished peanut butter sold under the tradename "Skippy," to be made in the United States in part from the Canadian slurry, would not require country of origin marking. After review of the HRL, the court's order of July 8, 1996 struck down as contrary to law Customs' Interim Regulation 19 C.F.R. § 134.35(a), effective January 1, 1994, implementing the North American Free Trade Agreement Implementation Act of 1993, Pub. L. No. 103-182, 107 Stat. 2057-2225 (December 3, 1993), codified at 19 U.S.C. § 3311, et. seq. ("Implementation Act"). As implied by its name, the Implementation Act placed into force the North American Free Trade Agreement ("NAFTA")

among the United States, Canada and Mexico. The genesis of 19 C.F.R. § 134.35(a) is briefly reviewed infra. This case was remanded to Customs for initial consideration of whether plaintiff's proposed manufacturing processes in the United States to make finished peanut butter would result in "substantial transformation" of the slurry under that test, as articulated in United States v. Gibson-Thomsen Co., 27 C.C.P.A. 267 (1940) (Gibson-Thomsen), thus making CPC the "ultimate purchaser" of the Canadian slurry under the marking statute, 19 U.S.C. § 1304(a).

In accordance with defendant's motion under CIT Rule 62(b), the court has stayed the remand proceedings pending decision of the current motion for rehearing. Familiarity with the initial opinion, and remand order is assumed herein.

While the court's initial opinion thoroughly addressed the issues raised up to that point, those issues have many aspects, the parties have made changes in their respective positions through the course of initial briefing, and defendant asserts that it did not previously have an opportunity to respond to new positions taken by plaintiff. Under all the facts and circumstances, including the complexity of the issues, the court believes that further analysis of the opposing arguments and amplification of the court's prior decision is warranted.

In addition to opposition papers submitted by CPC, memoranda in support of CPC's position and in opposition to defendant's motion were received from amici curiae The Pillsbury Company and Grocery Manufacturers of America, Inc.[1] in accordance with leave of court under CIT Rule 76. After extensive further consideration of the issues and in the light of the additional briefing, the court is persuaded that its initial conclusions are sound: notwithstanding the application

of the NAFTA Marking Rules to except from marking a good of a NAFTA country processed in the United States so as to become a good of the United States, the pre-NAFTA Gibson-Thomsen or substantial transformation test of an ultimate purchaser under § 1304(a) remains an additional basis for exemption from marking of NAFTA goods. Accordingly, Interim Regulation § 134.35(a), which bars application of the statutory ultimate purchaser provision as construed in Gibson-Thomsen to NAFTA goods, is contrary to law. Consequently, the court denies defendant's motion for rehearing.

DISCUSSION

I.

> Notwithstanding the undisputed validity of the exception from marking of NAFTA goods processed in the United States, based on the Marking Rules, the pre-NAFTA ultimate purchaser marking exception under 19 U.S.C. § 1304(a) as construed in Gibson-Thomsen also applies to NAFTA goods. Thus, in the HRL Customs erred in failing to consider whether CPC would be the "ultimate purchaser" of Canadian-origin peanut slurry under the Gibson-Thomsen test.

Shortly following the enactment of the NAFTA Implementation Act, and as authorized by the Act under 19 U.S.C. § 3314, for purposes of determining country of origin, and for other purposes, "Interim Regulations" were promulgated by Customs pursuant to T.D. 94-1 and 94-4 to implement the Act, and thereby, NAFTA.[2] The contested

Interim Regulation 19 C.F.R. § 134.35(a) was promulgated under T.D. 94-1, 58 Fed. Reg. 69460 (December 30, 1993), and became effective January 1, 1994. That regulation restricts to non-NAFTA goods the application of the substantial transformation test as articulated in Gibson-Thomsen for determination of the "ultimate purchaser" within the purview of 19 U.S.C. § 1304(a).[3]

In Gibson-Thomsen, the Court of Customs and Patent Appeals invoked the well settled principle of "substantial transformation" for determining whether an importer of goods to be further processed in the United States is the "ultimate purchaser" of such goods within the purview of 19 U.S.C. § 1304(a), thus dispensing with the statute's marking requirements for the finished goods produced in the United States. The Gibson-Thomsen substantial transformation test, also now commonly referred to as the "traditional" test or "ultimate purchaser marking exception," had prior to NAFTA been followed in a long line of judicial authority and administratively codified in 19 C.F.R. § 134.35, which so far as pertinent, reads:

> An article used in the United States in manufacture which results in an article having a name, character, or use differing from that of the imported article, will be within the principle of the decision in the case of United States v. Gibson-Thomsen Co., Inc., 27 C.C.P.A. 267 (C.A.D. 98). Under this principle, the manufacturer or processor in the United States who converts or combines the imported article into the different article will be considered the "ultimate purchaser" of the imported article within the contemplation of

> section 304(a), Tariff Act of 1930, as amended (19 U.S.C. § 1304(a)), and the article will be excepted from marking * * *

In T.D. 94-1, Customs amended, inter alia, Part 134 of the Customs Regulations to implement the provisions of NAFTA Article 311 and Annex 311, as placed into force by § 207 of the NAFTA Implementation Act. NAFTA Annex 311: (1) provides for the promulgation of Marking Rules used for determining whether a good is a good of a Party (NAFTA country) for the purposes specified in paragraph 1 of Annex 311 of NAFTA; and (2) sets forth general marking principles pertaining to the methods and procedures relating to country of origin marking of such goods. Part 134 sets forth regulations, including a definition of "ultimate purchaser" implementing the country of origin marking requirements and exceptions of § 1304(a) as well as the NAFTA implementing provisions promulgated under T.D. 94-1. See 19 C.F.R. § 134.0 (Scope). For purposes of Part 134 of the regulations, the definition of the term "ultimate purchaser" references the substantial transformation test, or for a good of a NAFTA country, a process which results in one of the changes prescribed in the NAFTA Marking as effecting a change in the article's country of origin. See 19 C.F.R. 134.1(d)(1).

Treas. Dec. 94-4, 59 Fed. Reg. 113, January 3, 1994, promulgated interim regulations, the most pertinent here being the so-called "Marking Rules" provided for under NAFTA Annex 311. Pursuant to T.D. 94-1, the specific Marking Rules for determining the country of origin of imported goods, i.e., when a good is a good of a Party for the purposes specified in paragraph 1 of Annex 311 of NAFTA, were promulgated under Part 102 of the Customs Regulations. Section 102.11 in Subpart B of Part 102, covers

general rules, and § 102.20 covers the specific change in tariff classification, or "tariff shift," rules based on the Harmonized Tariff Schedule of the United States.

Turning specifically to the challenged Interim Regulation § 134.35(a), T.D. 94-1 amended pre-NAFTA 19 C.F.R. § 134.35 by: (1) restricting that regulation, as stated in the italicized preface, to "articles other than goods of a NAFTA country" and redesignating former § 134.35 as § 134.35(a); and (2) by adding a new paragraph (b), "to indicate that the NAFTA Marking Rules will be used to determine when a good of a NAFTA country which is to be further processed in the United States is excepted from country of origin marking requirements." T.D. 94-1, Customs Bulletin, Vol. 28, p. 6. Thus, except for the italicized preface of § 134.35(a) restricting the paragraph to non-NAFTA goods, the text of pre-NAFTA § 134.35 remained essentially unchanged in the amended interim regulation. As aptly pointed out by defendant, the challenged regulation, 19 C.F.R. § 134.35(a), is not a "marking rule" per se.

Further, T.D. 94-1, as mentioned above, added a new paragraph (b) to former § 134.35 providing an altogether new exception to marking for NAFTA goods to be processed in the United States in such a manner that would result in the good becoming a "good of the United States under the NAFTA Marking Rules." Paragraph (b) mirrors the obligations of a NAFTA Party under Annex 311(5)(b)(viii) to provide the specified exception to marking for goods processed in the United States based on the Marking Rules.

Importantly, there is nothing in the Agreement or the Implementation Act that suggests that a NAFTA Party may not, in addition to the new NAFTA exemption for goods to

be processed in the United States so as to become a good of the United States under the Marking Rules, continue to enjoy any other pre-existing exception to marking under the existing law of a Party covering goods processed in the United States. Defendant insists that the NAFTA Marking Rules based on change in tariff classification simply codify the pre-existing Gibson-Thomsen substantial transformation test of an ultimate purchaser under § 1304(a), that § 134.35(a) abrogating the change in name, character or use substantial transformation test was a valid exercise of Customs' rulemaking authority, and accordingly, for NAFTA goods processed in the United States, to be within the ultimate purchaser exception to marking under § 1304(a), plaintiff must comply with the tariff shift rules, as is also required by the exception to marking under 19 C.F.R. § 134.35(b). In short, defendant posits that for NAFTA goods the Gibson-Thomsen substantial transformation test does not provide an exception to marking in addition to the application of the Marking Rules, while plaintiff insists that the Gibson-Thomsen test remains an additional test pursuant to the ultimate purchaser provision in § 1304(a).

As stressed in the initial opinion, 933 F. Supp. at 1105, for purposes of Customs' own the "dual approach" Marking Rules under § 102.20, the prescribed tariff shift had to concomitantly result in a substantial transformation, and under 19 C.F.R. § 102.1(p), the term "substantial transformation" for purposes of Part 102 is defined under the traditional criteria. This dual test approach under certain interim Marking Rules speaks volumes that Customs viewed the change in tariff classification rules (viz., the Marking Rules) and the traditional substantial transformation test based on change in name, character or use of the processed good as separate and independent methodologies which could

yield different results. Plaintiff and amici curiae have amply demonstrated by examples that the tariff shift concept of the Marking Rules frequently provides a different result than does application of the traditional "substantial transformation" test under Gibson-Thomsen. Consequently, as is evident from the dual test Marking Rules, NAFTA goods processed in the United States could fail to undergo the requisite tariff shift under a Marking Rule (thus failing to qualify for exception from marking under 19 C.F.R. § 134.35(b)) but nonetheless undergo a substantial transformation applying traditional Gibson-Thomsen criteria, and vice versa.

The dual tests required under certain Interim Marking Rules, with the potential for disparate results, buttresses the conclusion that the NAFTA Marking Rules did not simply "codify" the traditional substantial transformation criteria. In sum, the court holds that the traditional substantial transformation test under the ultimate purchaser provision of § 1304(a) remains an exception to marking for NAFTA goods processed in the United States in addition to application to such goods of the Marking Rules.

II.

> Customs' application of the NAFTA Marking Rules as a new or "revised definition" of the term "ultimate purchaser" under § 1304(a) for NAFTA goods, exceeded the agency's rulemaking authority and contravened the prohibitions of 19 U.S.C. § 3312(a).

Defendant asserts that Customs possesses broad regulatory authority under 19 U.S.C. §§ 66, 1304, 1624 and 3314 to

revise the traditional definition of an ultimate purchaser under § 1304(a) by rulemaking and that there are no prohibitions or limitations under the NAFTA Implementation Act on making such regulatory revision. The court disagrees.

It is noted that while defendant vigorously urges that the tariff shift rules codify the criteria of the substantial transformation test, it is clear that under § 134.35(a) the Gibson-Thomsen test under § 1304(a) is restricted to non-NAFTA goods, and for NAFTA goods an ultimate purchaser is determined according to the change in classification rules. 19 C.F.R. § 134.1(d). However, the NAFTA Implementation Act and its accompanying Statement of Administrative Action, approved by Congress in the Act, 19 U.S.C. § 3311(a), make it clear that in implementing NAFTA, Customs was authorized to promulgate NAFTA Marking Rules for purposes of Annex 311, id., H.R. Doc No. 159, 103d Cong., 1st Sess. (1993) at 479. Nothing in the Agreement, the Act, or Statement of Administrative Action suggests Customs was authorized to promulgate Marking Rules for any purpose other than NAFTA Annex 311. To the extent that the Marking Rules purport to be a "revised definition" of an ultimate purchaser under § 1304(a), or a codified "substantial transformation" test for NAFTA goods under § 1304(a) displacing Gibson-Thomsen from the statute, Customs exceeded its rulemaking authority to promulgate Marking Rules in furtherance of Annex 311 provisions.

As this court held in the original opinion, 933 F. Supp. at 1103-04, 19 U.S.C. § 3312(a)(2) expressly precludes construing or applying any provision of the Implementation Act as an amendment or modification of any law of the United States, unless specifically provided for in the Act. Additionally, § 3312(a)(1) makes ineffectual any provision of

NAFTA (i.e., Marking Rules, marking exceptions and definitions under Annex 311) and indeed broadly precludes application of any provision of the Agreement, "to any person or circumstance, which is inconsistent with any law of the United States." Id.

The court concludes that Customs' abrogation for NAFTA goods of the traditional substantial transformation test of an ultimate purchaser under § 1304(a) as construed in Gibson-Thomsen by amendment of its pre-NAFTA regulation § 134.35, and Customs' concomitant attempt through its Interim Regulations to bootstrap application of the Marking Rules into § 1304(a) as the "revised definition" of an ultimate purchaser to displace Gibson-Thomsen contravenes the prohibitions of § 3312(a).

Defendant's bald contention that the term "any law" in § 3312(a) means only statutory law to the exclusion of judicial authority and even agency regulations interpreting the statute is plainly disingenuous. Fundamentally, of course, there are different kinds of "law," and the word "law generally contemplates both statutory and case law" as well as agency rules and regulations. See Black's Law Dictionary, Sixth Ed. (1990), pp. 884-85.

Notwithstanding the prohibitions of § 3312(a), defendant insists that abrogation of the Gibson-Thomsen test for NAFTA goods under § 1304(a), and application of the Marking Rules in lieu thereof to a redefinition of the ultimate purchaser provision of the statute was a valid exercise of Customs' broad rulemaking authority, namely: to substitute rulemaking of general applicability (i.e., the Marking Rules) for adjudication (i.e., under the traditional substantial transformation test).

Under § 3314 of the Implementation Act, Customs was granted authority to promulgate regulations "necessary to ensure" that the Act was "appropriately" implemented. Plainly, in determining whether a specific regulation "appropriately" implements the Act, the court must inter alia, observe the effect of the regulation on the specific statutory prohibitions under § 3312(a). Customs' rulemaking authority under §§ 66, 1624, and 1304 does not expand the agency's authority to implement the Act in contravention of § 3312(a) nor to undercut the limitations on the specific delegated authority granted by Congress under § 3314 of the Act itself.

Finally, defendant also disingenuously argues that under § 3312(a)(2)(B) nothing in the Implementation Act shall be construed to limit Customs' authority under existing law. What defendant overlooks are the following words "unless specifically provided for in this Act," which means that the antecedent § 3312(a) prohibitions specifically limit Customs' authority under any law of the United States, including Customs' rulemaking authority under § 66, 1624 and 1304.

III.

> Since under the Implementation Act Congress amended certain provisions of 19 U.S.C. § 1304 to bifurcate them for NAFTA and non-NAFTA goods, but did not amend the ultimate purchaser provision in § 1304(a) to bifurcate it for NAFTA and non-NAFTA goods, clearly Congress intended that for NAFTA goods, there be no change in the pre-NAFTA application of the ultimate purchaser provision.

Pursuant to § 207 of the NAFTA Implementation Act, Congress amended 19 U.S.C. § 1304 in certain respects, but chose to preserve the existing language of the "ultimate purchaser" provision in § 1304(a), which provision had been subject to longstanding judicial and administrative interpretation following Gibson-Thomsen of which Congress was presumably aware. By contrast, Congress amended other provisions of the very same statute, specifically to bifurcate them for NAFTA and non-NAFTA goods.

For example, pursuant to § 207(a) Congress amended the ultimate purchaser exception under 19 U.S.C. § 1304(a)(3)(H) to bifurcate its application for NAFTA and non-NAFTA goods. Thus, for NAFTA goods, § 207(a) (and hence 19 U.S.C. § 1304 (h) (1) (A)), liberalizes or makes more lenient the standard of knowledge for that ultimate purchaser exception by substituting a "reasonably know" standard for NAFTA goods for the more stringent "necessarily know" standard for non-NAFTA goods. Section 207(a) of the Implementation Act also effected a bifurcation of the statute for NAFTA and non-NAFTA goods by excepting from marking original works of art and other NAFTA goods classified under certain tariff headings. 19 U.S.C. § 1304(h) (1)(B).

Given the Implementation Act's bifurcating amendments of § 1304, clearly if Congress had intended a similar bifurcation or disparate marking treatment for NAFTA and non-NAFTA goods in the application of the ultimate purchaser provision under § 1304(a), the court would expect to find some expression of that intent in the statute itself or at least its legislative history. The court finds no evidence whatever of any Congressional intent that the ultimate purchaser provision in § 1304(a) be interpreted any differently for

NAFTA and non-NAFTA goods, and the bifurcating amendments to other provisions of the same statute compel the conclusion that Congress intended no change in the application of the ultimate purchaser provision of § 1304(a).

Based on the foregoing amendatory action under § 1304, leaving the ultimate purchaser provision in § 1304(a) as construed in Gibson-Thomsen entirely intact, plaintiff's reliance on the oft- invoked doctrine of legislative ratification or adoption of judicial interpretation is entirely warranted. Pierce v. Underwood, 487 U.S. 552, 567, 101 L. Ed. 2d 490, 108 S. Ct. 2541 (1988); St. Paul Fire & Marine Ins. Co. v. Barry, 438 U.S. 531, 541, 57 L. Ed. 2d 932, 98 S. Ct. 2923 (1978); Lorillard v. Pons, 434 U.S. 575, 580, 55 L. Ed. 2d 40, 98 S. Ct. 866 (1978); Public Citizen, Inc. v. F.A.A., 300 U.S. App. D.C. 238, 988 F.2d 186, 194 (D.C. Cir. 1993). See also United States v. Palacio, 4 F.3d 150, 154 (2d Cir. 1993), cert. denied, 510 U.S. 1166, 114 S. Ct. 1194, 127 L. Ed. 2d 543 (1994).

IV.

> There is no merit in defendant's claim that application of Gibson-Thomsen to the ultimate purchaser provision in § 1304(a) would render application of the Marking Rules to except NAFTA goods from marking ineffective.

Defendant claims that application of Gibson-Thomsen to the ultimate purchaser provision of § 1304(a) would undermine application of the Marking Rules making them ineffective, since the objectives of the latter rules are general applicability, expedition and economy, while the former test requires a fact- specific analysis and adjudication on a

case-by-case basis. It follows, according to defendant, to avoid that result application to NAFTA goods of solely rules of general application - Marking Rules - to the exclusion of a fact-specific adjudication was within Customs' rulemaking authority.

While economical and expeditious determinations of the origin of goods and entitlement to marking exceptions are obviously worthy administrative goals, there is little merit in defendant's concern that the continued availability to the importing community of the traditional substantial transformation test under § 1304(a) will erode the application of the NAFTA Marking Rules.

First, defendant's objection to the fact-specific traditional test as adjunctive (or in addition to) to the tariff shift rules is inconsistent with Customs' own dual test interim Marking Rules under 19 C.F.R. § 102.20. While for many NAFTA goods, required application of both tests concurrently apparently proved redundant, see 60 Fed. Reg. at 22319; T.D. 96-48, 61 Fed. Reg. 28932, 28936 (June 6, 1996), because both tests yield the same result, it does not follow that for NAFTA goods failing the requisite tariff shift, application of a fact-specific adjunctive test under Gibson-Thomsen at the behest of the importer would render rules of general applicability ineffective in promoting expedition and economy.

If NAFTA goods should fail the generally applicable tariff shift test, as here, adjunctive application of the traditional test to the ultimate purchaser provision of § 1304(a) as requested by an importer remains consistent with Congressional intent under the marking statute, [4] the Implementation Act, and promotes the stated objectives of NAFTA: to eliminate

barriers to trade in, and facilitate the cross-border movement of goods between the territories of the NAFTA Parties.

If, as vigorously contended by defendant, the tariff shift rules simply "codify" the traditional substantial transformation test, and therefore, the Marking Rules generally produce essentially identical results to those reached by the traditional test, it is highly unlikely that importers' demands for costly fact-specific adjudication under the case-by-case traditional test will routinely occur, as apparently suggested by defendant. Moreover, importers invoking the traditional test and the fact- specific adjudicatory process have the rigorous burden of proving that, despite the failure of post-importation processing to comply with the requisite tariff shift, under the specific facts of the case there is still a change in the name, character or use of the imported product after processing of the imported good in the United States.

In short, the court is not persuaded by defendant that the NAFTA Marking Rules would be rendered meaningless, or adversely impacted, by the continued application of the traditional test to the ultimate purchaser provision of the statute.

V.

> The court owes no Chevron deference to Customs' "revised definition" of an ultimate purchaser, applying the Marking Rules.

Citing Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837, 81 L. Ed. 2d 694, 104 S. Ct. 2778 (1984), defendant further argues that the court must defer to Customs' "revised definition" of an ultimate purchaser under

§ 1304(a), under which definition the Marking Rules displace the traditional substantial transformation test. While in certain cases an agency's "revised interpretation" of a statutory term may be entitled to deference, Rust v. Sullivan, 500 U.S. 173, 186-87, 114 L. Ed. 2d 233, 111 S. Ct. 1759 (1991) (quoting Chevron, 467 U.S. at 863-64), that principle has no application here and defendant's contention merits little discussion.

Defendant's posited "revised definition" of an ultimate purchaser under § 1304(a) for NAFTA goods by applying the Marking Rules to the statute in lieu of Gibson-Thomesen, was nowhere suggested by Customs itself in the HRL. Moreover, as observed supra, such new or revised definition of the statutory provision exceeds Customs' delegated rulemaking authority and contravenes the prohibitions of the Implementation Act, § 3312(a). Accordingly, deference to a revised agency interpretation under Chevron has no application in this case.

VI.

> Defendant's argument that application of the Gibson-Thomsen test to CPC's post-importation processing reaches the same result as did Customs' in the HRL is post-hoc rationalization; application of the traditional test to CPC's processing has been remanded to Customs for a case-specific analysis and ruling, which must now be completed before any judicial review of the issues raised by applying the traditional test.

In the initial order, the court remanded this case for Customs' consideration of whether plaintiff's proposed manufacturing processes in the United States result in a substantial transformation of the imported good pursuant to the factors identified in Gibson-Thomsen. As noted at the outset, the remand proceedings were stayed pending decision of defendant's motion for rehearing. In support of its motion for rehearing and in response to the contentions of plaintiff and amici curiae, defendant maintains that application of substantial transformation reaches the same result as already reached by Customs in the HRL under Customs' hierarchical analysis.

An exception from marking under the ultimate purchaser provision of § 1304(a), whether applying Gibson-Thomsen criteria or the Marking Rules, was not addressed in the HRL, and defendant's contentions concerning the result that would be reached applying substantial transformation are therefore post hoc rationalization. Judicial review of the issues raised by the traditional criteria would clearly be premature at this juncture and must await initial agency review and a ruling on remand.

CONCLUSION

For the reasons expressed herein, the court adheres to its prior conclusion: 19 C.F.R. § 134.35(a) is contrary to law, and on remand Customs must rule on whether plaintiff would be the ultimate purchaser of the Canadian-origin peanut slurry within the provision therefor of § 1304(a) applying the traditional substantial transformation test. Customs will, of course, base its decision on the facts of record, a presented in the application for a ruling.

For all the foregoing reasons, it is hereby ORDERED:

Defendant's motion for rehearing is denied in all respects.

Customs shall complete its remand, submit the results to the court, and serve counsel for the respective parties within thirty (30) days of the service of this order.

Plaintiff and Amici Curiae may respond to the remand results within thirty (30) days of issuance.

Defendant may reply to any responses within fifteen (15) days of service.

Dated: New York, New York, January, 1997

Bernard Newman, Senior Judge

Footnotes

[1] Amicus curiae Grocery Manufacturers of America, Inc. (GMA) is a trade organization representing a broad spectrum of major companies, including many "Fortune 500" companies, that make and market the world's best known brands of food and consumer packaged goods. The sales of GMA member companies, totaling $ 360 billion, represent the large majority (85 percent) of the volume of all food and consumer packaged goods sold in the United States. Amicus curiae Pillsbury Company is among the well recognized United States food producers. Amici claim that because they (or their member companies) use imported ingredients in their U.S. manufacturing operations that are subject to the marking statute, they are prejudiced by the application of the

contested Customs Ruling and Interim Regulation § 134.35(a) implementing NAFTA.

[2] These Interim Regulations have now been adopted by Customs as final regulations. Determining the Country of Origin of a Good for Purposes of Annex 311 of NAFTA, 61 Fed. Reg. 28932 (June 6, 1996) (to be codified at 19 C.F.R. §§ 10, 12, 102, and 134).

[3] Unless otherwise indicated, all references herein to the "ultimate purchaser" provision shall refer to such provision in 19 U.S.C. § 1304(a).

[4] The intent of the marking statute was articulated in Gibson-Thomsen: there is "nothing in the statute [§ 1304(a)] to warrant a holding that the Congress intended to require that an imported article, which is to be used in the United States as material in the manufacture of a new article having a new name, character, and use, and which, when so used, becomes an integral part of the new article, be so marked as to indicate to the retail purchaser of the new article that such imported article or material was produced in a foreign country.' Id., 27 C.C.P.A. at 266, 273." Further, the Court of Customs and Patent Appeals in Gibson-Thomsen determined that Congress intended that § 1304(a) "cover only such imported articles as do not lose their identity as such when combined with other articles." Id., 27 C.C.P.A. at 273. In the application of a marking statute, it is the intent of Congress that must prevail, and no application of the NAFTA Marking Rules should be permitted by the Court to defeat Congressional intent under the statute. As aptly observed by amicus GMA, regardless of the test applied under the statute, the issue remains the same: whether a finished article offered for sale to the ultimate consumer is, for purposes of § 1304(a), the same article as the

"article of foreign origin ... imported into the United States. Thus, regardless of the test, if the finished article is not an "article of foreign origin," country of origin marking is not required under the statute. Regulations that defeat the purpose of the statute cannot be permitted to stand.

Statutes In This Document

19 U.S.C. § 3311
19 U.S.C. § 3312
19 U.S.C. § 3314
19 U.S.C. § 1304
NAFTA Annex 311
19 C.F.R. §134.35

19 U.S.C. SEC. 3311. APPROVAL AND ENTRY INTO FORCE OF THE NORTH AMERICAN FREE TRADE AGREEMENT.

(a) Approval of Agreement and Statement of Administrative Action.-- Pursuant to section 1103 of the Omnibus Trade and Competitiveness Act of 1988 (19 U.S.C. 2903) and section 151 of the Trade Act of 1974 (19 U.S.C. 2191), the Congress approves--(1) the North American Free Trade Agreement entered into on December 17, 1992, with the Governments of Canada and Mexico and submitted to the Congress on November 4, 1993; and(2) the statement of administrative action proposed to implement the Agreement that was submitted to the Congress on November 4, 1993.(b) Conditions for Entry Into Force of the Agreement.--The President is authorized to exchange notes with the Government of Canada or Mexico providing for the entry into force, on or after January 1, 1994, of the Agreement for the United States with respect to such country at such time as--(1) the President--(A) determines that such country has implemented the statutory changes necessary to bring that country into compliance with its obligations under the Agreement and has made provision to implement the Uniform Regulations

provided for under article 511 of the Agreement regarding the interpretation, application, and administration of the rules of origin, and(B) transmits a report to the House of Representatives and the Senate setting forth the determination under subparagraph (A) and including, in the case of Mexico, a description of the specific measures taken by that country to--(I) bring its laws into conformity with the requirements of the Schedule of Mexico in Annex 1904.15 of the Agreement, and(ii) otherwise ensure the effective implementation of the binational panel review process under chapter 19 of the Agreement regarding final antidumping and countervailing duty determinations; and(2) the Government of such country exchanges notes with the United States providing for the entry into force of the North American Agreement on Environmental Cooperation and the North
American Agreement on Labor Cooperation for that country and the United States.

Sec. 3312. Relationship of Agreement to United States and State law

(a) Relationship of Agreement to United States law

(1) United States law to prevail in conflict

No provision of the Agreement, nor the application of any such provision to any person or circumstance, which is inconsistent with any law of the United States shall have effect.

(2) Construction

Nothing in this Act shall be construed -

(A) to amend or modify any law of the United States, including any law regarding -

(I) the protection of human, animal, or plant life or health,

(ii) the protection of the environment, or

(iii) motor carrier or worker safety; or

(B) to limit any authority conferred under any law of the United States, including section 2411 of this title; unless specifically provided for in this Act.

(b) Relationship of Agreement to State law

(1) Federal-State consultation

(A) In general

On December 8, 1993, the President shall, through the intergovernmental policy advisory committees on trade established under section 2114c(2)(A) of this title, consult with the States for the purpose of achieving conformity of State laws and practices with the Agreement.

(B) Federal-State consultation process

The Trade Representative shall establish within the Office of the United States Trade Representative a Federal-State consultation process for addressing issues relating to the Agreement that directly relate to, or will potentially have a direct impact on, the States. The Federal-State consultation process shall include procedures under which -

(I) the Trade Representative will assist the States in identifying those State laws that may not conform with the Agreement but may be maintained under the Agreement by reason of being in effect before the Agreement entered into force;

(ii) the States will be informed on a continuing basis of matters under the Agreement that directly relate to, or will potentially have a direct impact on, the States;

(iii) the States will be provided opportunity to submit, on a continuing basis, to the Trade Representative information and advice with respect to matters referred to in clause (ii);

(iv) the Trade Representative will take into account the information and advice received from the States under clause (iii) when formulating United States positions regarding matters referred to in clause (ii); and (v) the States will be involved (including involvement through the inclusion of appropriate representatives of the States) to the greatest extent practicable at each stage of the development of United States positions regarding matters referred to in clause (ii) that will be addressed by committees, subcommittees, or working groups established under the Agreement or through dispute settlement processes provided for under the Agreement. The Federal Advisory Committee Act (5 U.S.C. App.) shall not apply to the Federal-State consultation process established by this paragraph.

(2) Legal challenge

No State law, or the application thereof, may be declared invalid as to any person or circumstance on the ground that the provision or application is inconsistent with the Agreement, except in an action brought by the United States for the purpose of declaring such law or application invalid.

(3) "State law" defined

For purposes of this subsection, the term "State law" includes -

(A) any law of a political subdivision of a State; and

(B) any State law regulating or taxing the business of insurance.

(C) Effect of Agreement with respect to private remedies

No person other than the United States -

(1) shall have any cause of action or defense under -

(A) the Agreement or by virtue of Congressional approval thereof, or

(B) the North American Agreement on Environmental Cooperation or the North American Agreement on Labor Cooperation; or

(2) may challenge, in any action brought under any provision of law, any action or inaction by any department, agency, or other instrumentality of the United States, any State, or any political subdivision of a State on the ground that such action or inaction is inconsistent with the Agreement, the North American Agreement on Environmental Cooperation, or the North American Agreement on Labor Cooperation.

-SOURCE-

(Pub. L. 103-182, title I, Sec. 102, Dec. 8, 1993, 107 Stat. 2062.)

Sec. 3314. Implementing actions in anticipation of entry into force and initial regulations

(a) Implementing actions

After December 8, 1993 -

(1) the President may proclaim such actions; and

(2) other appropriate officers of the United States Government may issue such regulations; as may be necessary to ensure that any provision of this Act, or amendment made by this Act, that takes effect on the date the Agreement enters into force is appropriately implemented on such date, but no such proclamation or regulation may have an effective date earlier than the date of entry into force. The 15-day restriction in section 3313(b) of this title on the taking effect of proclaimed actions is waived to the extent that the application of such restriction would prevent the taking effect on the date the Agreement enters into force of any action proclaimed under this section.

(b) Initial regulations

Initial regulations necessary or appropriate to carry out the actions proposed in the statement of administrative action submitted under section 3311(a)(2) of this title to implement the Agreement shall, to the maximum extent feasible, be issued within 1 year after the date of entry into force of the Agreement; except that interim or initial regulations to

implement those Uniform Regulations regarding rules of origin provided for under article 511 of the Agreement shall be issued no later than the date of entry into force of the Agreement. In the case of any implementing action that takes effect on a date after the date of entry into force of the Agreement, initial regulations to carry out that action shall, to the maximum extent feasible, be issued within 1 year after such effective date.

-SOURCE-

(Pub. L. 103-182, title I, Sec. 104, Dec. 8, 1993, 107 Stat. 2064.)

Annex 311: Country of Origin Marking

1. The Parties shall establish by January 1, 1994, rules for determining whether a good is a good of a Party ("Marking Rules") for purposes of this Annex, Annex 300-B and Annex 302.2, and for such other purposes as the Parties may agree.

2. Each Party may require that a good of another Party, as determined in accordance with the Marking Rules, bear a country of origin marking, when imported into its territory, that indicates to the ultimate purchaser of that good the name of its country of origin.

3. Each Party shall permit the country of origin marking of a good of another Party to be indicated in English, French or Spanish, except that a Party may, as part of its general consumer information measures, require that an imported good be marked with its country of origin in the same manner as prescribed for goods of that Party.

4. Each Party shall, in adopting, maintaining and applying any measure relating to country of origin marking, minimize the difficulties, costs and inconveniences that the measure may cause to the commerce and industry of the other Parties.

5. Each Party shall:

(a) accept any reasonable method of marking of a good of another Party, including the use of stickers, labels, tags or paint, that ensures that the marking is conspicuous, legible and sufficiently permanent;

(b) exempt from a country of origin marking requirement a good of another Party that

(i) is incapable of being marked,

(ii) cannot be marked prior to exportation to the territory of another Party without causing injury to the goods,

(iii) cannot be marked except at a cost that is substantial in relation to its customs value so as to discourage its exportation to the territory of the Party,

(iv) cannot be marked without materially impairing its function or substantially detracting from its appearance,

(v) is in a container that is marked in a manner that will reasonably indicate the good's origin to the ultimate purchaser,

(vi) is a crude substance,

(vii) is imported for use by the importer and is not intended for sale in the form in which it was imported,

(viii) is to undergo production in the territory of the importing Party by the importer, or on its behalf, in a manner that would result in the good becoming a good of the importing Party under the Marking Rules,

(ix) by reason of its character, or the circumstances of its importation, the ultimate purchaser would reasonably know its country of origin even though it is not marked,

(x) was produced more than 20 years prior to its importation,

(xi) was imported without the required marking and cannot be marked after its importation except at a cost that would be substantial in relation to its customs value, provided that the failure to mark the good before importation was not for the purpose of avoiding compliance with the requirement,

(xii) for purposes of temporary duty-free admission, is in transit or in bond or otherwise under customs administration control,

(xiii) is an original work of art, or

(xiv) is provided for in subheading 6904.10, or heading 8541 or 8542.

6. Except for a good described in subparagraphs 5(b)(vi), (vii), (viii), ix), (x), (xii), (xiii) and (xiv), a Party may provide that, wherever a good is exempted under subparagraph 5(b), its outermost usual container shall be marked so as to indicate the country of origin of the good it contains.

7. Each Party shall provide that:

(a) a usual container imported empty, whether or not disposable, shall not be required to be marked with its own country of origin, but the container in which it is imported may be required to be marked with the country of origin of its contents; and

(b) a usual container imported filled, whether or not disposable,

(i) shall not be required to be marked with its own country of origin, but

(ii) may be required to be marked with the country of origin of its contents, unless the contents are marked with their country of origin and the container can be readily opened for inspection of the contents, or the marking of the contents is clearly visible through the container.

8. Each Party shall, wherever administratively practicable, permit an importer to mark a good of a Party subsequent

to importation but prior to release of the good from customs control or custody, unless there have been repeated violations of the country of origin marking requirements of the Party by the same importer and that importer has been previously notified in writing that such good is required to be marked prior to importation.

9. Each Party shall provide that, except with respect to importers that have been notified under paragraph 8, no special duty or penalty shall be imposed for failure to comply with country of origin marking requirements of that Party, unless the good is removed from customs custody or control without being properly marked, or a deceptive marking has been used.

10. The Parties shall cooperate and consult on matters related to this Annex, including aditional exemptions from a country of origin marking requirement, in accordance with Article 513 (Customs Procedures - Working Group and Customs Subgroup).

11. For purposes of this Annex:

conspicuous means capable of being easily seen with normal handling of the good or container; customs value means the value of a good for purposes of levying duties of customs on an imported good; legible means capable of being easily read; sufficiently permanent means capable of remaining in place until the good reaches the ultimate purchaser, unless deliberately removed; the form in which it was imported means the condition of the good before it has undergone one of the changes in tariff classification described in the Marking Rules; ultimate purchaser means the last person in the territory of an importing Party that purchases the good in the

form in which it was imported; such purchaser need not be the last person that will use the good; and usual container means the container in which a good will ordinarily reach its ultimate purchaser.

19 U.S.C. Sec. 1304 **1/26/98**

Sec. 1304. Marking of imported articles and containers

(a) Marking of articles

Except as hereinafter provided, every article of foreign origin (or its container, as provided in subsection (b) hereof) imported into the United States shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article (or container) will permit in such manner as to indicate to an ultimate purchaser in the United States the English name of the country of origin of the article. The Secretary of the Treasury may by regulations -

(1) Determine the character of words and phrases or abbreviations thereof which shall be acceptable as indicating the country of origin and prescribe any reasonable method of marking, whether by printing, stenciling, stamping, branding, labeling, or by any other reasonable method, and a conspicuous place on the article (or container) where the marking shall appear;

(2) Require the addition of any other words or symbols which may be appropriate to prevent deception or mistake as to the origin of the article or as to the origin of any other article with which such imported article is usually combined subsequent to importation but before delivery to an ultimate purchaser; and

(3) Authorize the exception of any article from the requirements of marking if -

(A) Such article is incapable of being marked;

(B) Such article cannot be marked prior to shipment to the United States without injury;

(C) Such article cannot be marked prior to shipment to the United States, except at an expense economically prohibitive of its importation;

(D) The marking of a container of such article will reasonably indicate the origin of such article;

(E) Such article is a crude substance;

(F) Such article is imported for use by the importer and not intended for sale in its imported or any other form;

(G) Such article is to be processed in the United States by the importer or for his account otherwise than for the purpose of concealing the origin of such article and in such manner that any mark contemplated by this section would necessarily be obliterated, destroyed, or permanently concealed;

(H) An ultimate purchaser, by reason of the character of such article or by reason of the circumstances of its importation, must necessarily know the country of origin of such article even though it is not marked to indicate its origin;

(I) Such article was produced more than twenty years prior to its importation into the United States;

(J) Such article is of a class or kind with respect to which the Secretary of the Treasury has given notice by publication in the weekly Treasury Decisions within two years after July 1, 1937, that articles of such class or kind were imported in substantial quantities during the

five-year period immediately preceding January 1, 1937, and were not required during such period to be marked to indicate their origin: Provided, That this subdivision shall not apply after September 1, 1938, to sawed lumber and timbers, telephone, trolley, electric-light, and telegraph poles of wood, and bundles of shingles; but the President is authorized to suspend the effectiveness of this proviso if he finds such action required to carry out any trade agreement entered into under the authority of sections 1351, 1352, 1353, 1354 of this title, as extended; or

(K) Such article cannot be marked after importation except at any expense which is economically prohibitive, and the failure to mark the article before importation was not due to any purpose of the importer, producer, seller, or shipper to avoid compliance with this section.

19 C.F.R. Sec. 134.35 Articles substantially changed by manufacture.

(a) Articles other than goods of a NAFTA country. An article used in the United States in manufacture which results in an article having a name, character, or use differing from that of the imported article, will be within the principle of the decision in the case of United States v. Gibson-Thomsen Co., Inc., 27 C.C.P.A. 267 (C.A.D. 98). Under this principle, the manufacturer or processor in the United States who converts or combines the imported article into the different article will be considered the "ultimate purchaser" of the imported article within the contemplation of section 304(a), Tariff Act of 1930, as amended (19 U.S.C. 1304(a)), and the article shall be excepted from marking. The outermost containers of the imported articles shall be
marked in accord with this part.

(b) Goods of a NAFTA country. A good of a NAFTA country which is to be processed in the United States in a manner that would result in the good becoming a good of the United States under the NAFTA Marking Rules is excepted from marking. Unless the good is processed by the importer or on its behalf, the outermost container of the good shall be marked in accord with this part.

[T.D. 72-262, 37 FR 20318, Sept. 29, 1972, as amended by T.D. 94-1, 58
FR 69472, Dec. 30, 1993]

Supreme Court, U.S.
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No. 98-1735

In the Supreme Court of the United States

BESTFOODS (FORMERLY KNOWN AS CPC INTERNATIONAL, INC.), PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the peanut butter manufactured by petitioner must be marked to reflect the Canadian origin of the peanut slurry used to produce it.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	4
Conclusion	11

TABLE OF AUTHORITIES

Cases:

Chevron U.S.A. Inc. v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)	8
Herb v. *Pitcairn*, 324 U.S. 117 (1945)	5
NLRB v. *Bell Aerospace Co.*, 416 U.S. 267 (1974)	9-10
Pabrini Inc. v. *United States*, 630 F. Supp. 360 (Ct. Int'l Trade 1986)	7
SEC v. *Chenery Corp.*, 332 U.S. 194 (1947)	10
Target Sportswear, Inc. v. *United States*, 875 F. Supp. 835 (Ct. Int'l Trade), aff'd, 70 F.3d 604 (Fed. Cir. 1995), cert. denied, 517 U.S. 1208 (1996)	9
United States v. *Gibson-Thomsen Co.*, 27 C.C.P.A. 267 (1940)	2
United States v. *Haggar Apparel Co.*, 119 S. Ct. 1392 (1999)	8

Statutes and regulations:

Customs Administration Act, ch. 679, § 3, 52 Stat. 1077 (19 U.S.C. 1304(a))	6
North American Free Trade Agreement Implementation Act of 1993, Pub. L. No. 103-182, 107 Stat. 2057 (19 U.S.C. 3301 *et seq.*):	
19 U.S.C. 3314(a)(2)	8
19 U.S.C. 3314(b)	4, 8, 10
Tariff Act of 1930, ch. 497, Tit. III, § 304, 46 Stat. 687 (19 U.S.C. 1001 *et seq.*)	6
19 U.S.C. 1304	2, 5

Statutes and regulations—Continued: Page

19 U.S.C. 1304(a) 2, 6
19 U.S.C. 1304(a)(3) 7
19 U.S.C. 1624 ..... 6, 7, 8, 10
19 U.S.C. 66 6
19 C.F.R.:
Pt. 102 2
Section 102.18(b)(2) 3
Section 102.20 (1995) 9
Pt. 134:
Section 134.35(b) 2

Miscellaneous:

Customs Administrative Act: Hearings on H.R. 8099 Before the Subcomm. of the Senate Comm. on Finance, 75th Cong., 3d Sess. (1938) 7
Customs Administrative Bill: Hearings on H.R. 6738 Before the House Comm. on Ways & Means, 75th Cong., 1st Sess. (1937) 7
58 Fed. Reg. pp. 69,460-69,462 (1993) 9
59 Fed. Reg. (1994):
p. 110 9
p. 141 9
p. 142 9
60 Fed. Reg. (1995):
pp. 22,313-22,314 9
pp. 22,314-22,330 9
Joseph A. LaNasa, III, *Rules of Origin Under the North American Free Trade Agreement: A Substantial Transformation Into Objectively Transparent Protectionism*, 34 Harv. Int'l L.J. 381 (1993) 9

In the Supreme Court of the United States

No. 98-1735

BESTFOODS (FORMERLY KNOWN AS CPC INTERNATIONAL, INC.), PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 165 F.3d 1371. The opinions of the Court of International Trade (Pet. App. 13a-46a, 47a-67a; C.A. Supp. App. 2-13) are reported at 933 F. Supp. 1093, 956 F. Supp. 1014, and 971 F. Supp. 574.

JURISDICTION

The judgment of the court of appeals was entered on January 25, 1999. The petition for a writ of certiorari was filed on April 25, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner makes peanut butter from peanut slurry, which is "a gritty, peanut-based paste" (Pet. App. 2a). Most of the peanut slurry used at petitioner's Arkansas plant is made in the United States, but "between 10 and 40 percent * * * is made in Canada" (*ibid.*). In January 1993, petitioner sought a ruling from the Customs Service as to whether the federal marking statute, 19 U.S.C. 1304, requires petitioner to mark its peanut butter to indicate the Canadian origin of the peanut slurry used to produce it. Under that statute, an article of foreign origin must be "marked in a conspicuous place * * * in such manner as to indicate to an ultimate purchaser in the United States * * * the country of origin of the article." 19 U.S.C. 1304(a). The marking requirement applies if the imported article has not undergone a "substantial transformation" following importation into the United States (Pet. App. 2a, citing *United States* v. *Gibson-Thomsen Co.*, 27 C.C.P.A. 267 (1940)). Such a "substantial transformation" is said to occur if, as a result of processing in the United States, the imported article loses its identity and is transformed into a new product having "a new name, character, and use." 27 C.C.P.A. at 273.

Petitioner claimed that the manufacture of peanut butter causes a "substantial transformation" of the imported peanut slurry and that the marking statute is therefore inapplicable. The Customs Service concluded, however, that marking of this product is required under regulations promulgated pursuant to the North American Free Trade Agreement (NAFTA). Under those regulations (19 C.F.R. §§ 102, 134.35(b)), an article imported from a NAFTA nation is considered to have undergone a "substantial transformation" only

if the processing or manufacturing steps that occur in this country are sufficient to change its tariff classification. Applying the NAFTA rules (19 C.F.R. § 102.18(b)(2)), the Customs Service determined that, (i) because the peanut slurry had "the essential character of the finished peanut butter," the same tariff classification applies to both and, (ii) because no "tariff shift" occurred, petitioner's peanut butter must be marked to reflect the Canadian origin of the imported peanut slurry (Pet. App. 4a).

2. Petitioner challenged the agency's ruling in the Court of International Trade. The court held that the regulations issued by the agency under NAFTA were invalid because they did not apply the same case-by-case "substantial transformation" test that governed prior to adoption of NAFTA. The court remanded the case to the agency for application of the case-by-case "substantial transformation" test to the facts of this case (Pet. App. 4a-5a).

On remand, the agency concluded that "the imported peanut slurry was not substantially transformed by being processed into peanut butter, because the essential character of the finished peanut butter was imparted by the peanut slurry" (Pet. App. 5a). The agency therefore ruled that marking of petitioner's peanut butter was required under the "substantial transformation" test.

The Court of International Trade upheld the agency's determination. The court concluded that "peanut slurry is a form of peanut butter, and that the processing * * * to convert peanut slurry into peanut butter did not alter the essential character of the product" (Pet. App. 5a).

3. The court of appeals upheld the agency's determination that petitioner is required to mark its peanut

butter under the NAFTA regulations. In so holding, the court of appeals reversed the determination of the Court of International Trade that these regulations are invalid (Pet. App. 5a, 12a).

The court of appeals noted that NAFTA "required the Secretary of the Treasury to adopt marking rules, based on the tariff-shift approach," for goods moving among the NAFTA signatory nations (Pet. App. 8a). Annex 311 of NAFTA (Pet. App. 76a-80a) specifies that an imported article is not subject to the marking requirement if it undergoes "a tariff shift after importation" (Pet. App. 9a). In enacting 19 U.S.C. 3314(b), Congress expressly authorized the Secretary of the Treasury to promulgate such rules and regulations as are "necessary or appropriate" to implement these NAFTA provisions. *Ibid.* The court of appeals concluded that (Pet. App. 9a):

> [T]he effect of Congress's authorizing the Secretary of the Treasury to promulgate regulations "necessary or appropriate" to make the United States' marking rules comply with the requirements of Annex 311, see 19 U.S.C. §3314(b), was to empower the Secretary to adopt a construction of the federal marking statute, for NAFTA goods, that was based on the tariff-shift approach * * * .

Because the NAFTA regulations properly govern this case, the court of appeals found it unnecessary to consider whether, in the absence of those regulations, marking of petitioner's peanut butter would have been required under the pre-NAFTA "substantial transformation" test (Pet. App. 5a).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. As the facts of this case illustrate, the "tariff shift" test and the case-by-case "substantial transformation" test will often yield the same result. A good whose tariff classification and "essential character" is unchanged is ordinarily one that has not been "substantially transformed" (Pet. App. 5a). In the present case, for example, the Customs Service concluded *both* (i) that the tariff classification of the imported good was not changed because its "essential character" was not altered by the processing and (ii) that the processing of the imported good did not cause a "substantial transformation" of it (*ibid.*). The question whether one or the other of these closely related standards ultimately governs in such cases is not properly framed for review here, for a determination of the governing legal standard would not alter the ultimate disposition of the substantive controversy. Indeed, the legal test that petitioner contends should govern *was* applied in the Court of International Trade, and the agency's determination was upheld under that standard (*ibid.*).

In this context, review of the abstract question that petitioner frames is not warranted. This Court sits "to correct wrong judgments, not to revise opinions" (*Herb* v. *Pitcairn*, 324 U.S. 117, 126 (1945)).

2. a. Petitioner errs in asserting (Pet. 16-18) that Congress has traditionally withheld from the agency any authority to interpret and implement the marking requirements of 19 U.S.C. 1304. In the Tariff Act of 1930, Congress expressly delegated broad rulemaking

authority to the Secretary of the Treasury to adopt "such rules and regulations as may be necessary to carry out" the tariff laws, including in particular the marking requirements of Section 1304. 19 U.S.C. 1624. See also 19 U.S.C. 66.

Petitioner nonetheless asserts that, in enacting the Customs Administration Act of 1938, Congress "explicitly denied" (Pet. 16) the agency any authority over the marking provisions. As originally enacted, the first sentence of the Tariff Act of 1930, ch. 497, Tit. III, § 304, 46 Stat. 687 (emphasis added), provided:

> (a) *Manner of Marking.*—Every article imported into the United States, and its immediate container, and the package in which such article is imported, shall be marked, stamped, branded, or labeled in legible English words, in a conspicuous place, in such manner as to indicate the country of origin of such article, *in accordance with such regulations as the Secretary of the Treasury may prescribe.*

In contrast, the first sentence of the Customs Administration Act, ch. 679, § 3, 52 Stat. 1077 (19 U.S.C. 1304(a)), provides:

> (a) *Marking of Articles.*—Except as hereinafter provided, every article of foreign origin (or its container * * *) imported into the United States shall be marked in a conspicuous place as legibly, indelibly, and permanently as the nature of the article (or container) will permit in such manner as to indicate to an ultimate purchaser in the United States the English name of the country of origin of the article.

Petitioner claims that, by removing the phrase "in accordance with such regulations as the Secretary

* * * may prescribe" from the first sentence of the 1930 statute, Congress "expressly repealed" the Secretary's authority to define, by regulation, the terms included in the basic marking requirement.

The deleted phrase, however, concisely and directly referred to the Secretary's authority to regulate *how*, not *whether*, imported articles were to be marked—even the title of the relevant section of the 1930 statute is "*Manner* of Marking." (Emphasis added). Instead of limiting the agency's preexisting authority to adopt all "necessary" regulations to administer the substantive provisions of the Tariff Act (19 U.S.C. 1624), the 1938 amendment actually expanded it by authorizing the adoption of regulations to establish exceptions from the marking requirements. 19 U.S.C. 1304(a)(3).[1] Nothing in the history of the 1930 and 1938 provisions supports

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[1] The focus of the 1938 amendment was to eliminate the requirement of the 1930 statute that the article, its immediate container, and outer package all be marked. *Customs Administrative Bill: Hearings on H.R. 6738 Before the House Comm. on Ways & Means*, 75th Cong., 1st Sess. 34 (1937); see also *Customs Administrative Act: Hearings on H.R. 8099 Before the Subcomm. of the Senate Comm. on Finance*, 75th Cong., 3d Sess. 4 (1938). The debate over the amendment focused on the theoretical implictions of the proposed statutory language designed to eliminate the unnecessary triple marking of the article, its immediate container, and outer package. *Hearings on H.R. 6738, supra*, at 41-50. Because the proposed amendment began with the phrase "under such regulations as the Secretary of the Treasury *may* prescribe," some members of Congress expressed the concern that the basic requirement of marking imports might become discretionary rather than mandatory. *Ibid.* (emphasis added). The focus of the debate concerned how to delineate circumstances in which the Secretary could prescribe, by regulation, exceptions for certain articles without authorizing the Secretary to eliminate the mandatory character of the basic marking requirement. See *ibid.*; *Pabrini Inc.* v. *United States*, 630 F. Supp. 360, 361 (Ct. Int'l Trade 1986).

the assertion of petitioner that Congress sought to deny the agency a power—that had in fact been granted in 19 U.S.C. 1624—to adopt rules and regulations to implement the marking requirements of Section 1304.

b. Petitioner errs in asserting (Pet. 19) that, in authorizing the agency to adopt rules and regulations to implement the provisions of NAFTA (19 U.S.C. 3314(a)(2)), Congress did not intend to confer any power on the agency to determine marking rules for NAFTA goods. Petitioner's assertion is primarily based on the contention that Congress had historically withheld such interpretive power over marking requirements from the agency. As we have just shown, however, the historical foundation on which petitioner rests this contention is incorrect. Congress granted that authority to the agency in 1930, and did not withdraw it in 1938. When, in 1994, Congress authorized the agency to adopt rules to implement the provisions of NAFTA (19 U.S.C. 3314(b)), Congress merely continued its longstanding policy of delegating interpretive authority over marking requirements to the agency.

c. Contrary to petitioner's contention (Pet. 24-25), the NAFTA regulations promulgated by the Secretary of the Treasury, and implemented by the Customs Service, are entitled to deference under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-843 (1984), and *United States* v. *Haggar Apparel Co.*, 119 S. Ct. 1392 (1999). The challenged regulations are a reasonable interpretation of the requirement of Annex 311 of NAFTA that imported NAFTA goods be exempt from marking when "the condition of the good * * * has undergone [a] * * * change[] in tariff classification" (Pet. App. 79a; *id.* at 6a).

The facts of this case demonstrate the reasonableness of the agency's regulation. The regulation continues to apply the marking requirement by reference to whether the imported article has undergone a "substantial transformation." The sole difference between the two approaches is that, consistent with NAFTA Annex 311, the application of this standard for NAFTA goods is determined through the mechanism of tariff shift and related rules. 19 C.F.R. § 102.20 (1995). This regulatory approach seeks to accomplish the substance of the former case-by-case adjudicatory method through a more predictable and consistent method. As the agency has explained, the regulation seeks to "provide the results that would be reached under a case-by-case application of the substantial transformation rule." 59 Fed. Reg. 142 (1994); see 60 Fed. Reg. 22,314-22,330 (1995). The principal advantage of the tariff shift rules is that they lend more certainty and uniformity to the "substantial transformation" test. 60 Fed. Reg. at 22,313-22,314; 59 Fed. Reg. at 141.[2]

The Secretary has ample discretion to adopt a rule-oriented approach, in lieu of an adjudicatory case-by-case approach, in making these determinations. See, *e.g.*, *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 293

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[2] The Customs Service provided a detailed explanation of the reasons for adopting the administrative approach set forth in the NAFTA regulations. See 58 Fed. Reg. 69,460-69,462 (1993); 59 Fed. Reg. at 110, 141 (cited in *Target Sportswear, Inc.* v. *United States*, 875 F. Supp. 835, 842 (Ct. Int'l Trade), aff'd, 70 F.3d 604 (Fed. Cir. 1995), cert. denied, 517 U.S. 1208 (1996)). See also J. LaNasa, III, *Rules of Origin Under NAFTA: A Substantial Transformation Into Objectively Transparent Protectionism*, 34 Harv. Int'l L.J. 381, 383-386, 390-391, 406 (1993) (discussing advantages of rule-oriented methodology to determine issue of "substantial transformation").

(1974); *SEC* v. *Chenery Corp.*, 332 U.S. 194, 203 (1947). In view of the specific endorsement of the "tariff shift" method for implementing marking rules under NAFTA Annex 311, the court of appeals correctly concluded (Pet. App. 8a-9a) that the regulations conform to the text and the purpose of the statute and should therefore be sustained. As the court explained (*id.* at 9a):

> [T]he effect of Congress's authorizing the Secretary of the Treasury to promulgate regulations "necessary or appropriate" to make the United States' marking rules comply with the requirements of Annex 311, see 19 U.S.C. § 3314(b), was to empower the Secretary to adopt a construction of the federal marking statute, for NAFTA goods, that was based on the tariff-shift approach * * * .

Petitioner argues that, in upholding this delegation of rulemaking authority to the agency, the court of appeals "completely overlook[ed] Congress' clear direction * * * that nothing in the Act [implementing NAFTA] shall be construed to amend or modify any law of the United States, except as 'specifically provided' therein" (Pet. 22). The provisions of NAFTA plainly contemplate, however, that marking rules were to be adopted, for Annex 311 specifies that all "Parties shall establish by January 1, 1994, rules for determining whether a good is a good of a party ('Marking Rules')." Annex 311, ¶ 1 to NAFTA (Pet. App. 76a). To accomplish that undertaking, Congress supplemented the broad, preexisting rulemaking authority of the Secretary to implement and administer the Tariff Act of 1930 (19 U.S.C. 1624) with a similarly broad authority to promulgate all rules and regulations "necessary or appropriate" to implement and administer NAFTA. 19 U.S.C. 3314(b).

The court of appeals correctly concluded that the Secretary's adoption of a rule-oriented tariff-shift method in determining whether goods imported from a NAFTA country are "substantially transformed" during domestic processing constitutes a "permissible interpretation" of the governing statutes (Pet. App. 8a-9a). By issuing that regulation, the agency was simply utilizing the specific authority granted by Congress to fulfill the obligation of the United States under NAFTA to adopt rules to implement the NAFTA marking requirements.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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No. 98-1735

In the

Supreme Court of the United States

October Term, 1998

BESTFOODS (formerly known as
CPC INTERNATIONAL, INC.),

Petitioner,

v

UNITED STATES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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REPLY TO BRIEF IN OPPOSITION

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ARGUMENT 1

1. The *NAFTA Marking Rules* Applied to Determine Origin Marking Requirements for Goods Produced Domestically Will Affect the Marking of Petitioner's Goods and Will Have a Broad Impact on Administration of the Marking Law. 1

2. Congress in 1938 Expressly Denied the Secretary of the Treasury the Power to Define the Scope of Operation of the Marking Law; The *NAFTA Implementation Act* Did Not Restore Such Power. 3

CONCLUSION 10

TABLE OF AUTHORITIES

Cases

Campbell v. United States, 107 U.S. 407 (1883) 6

Chevron U.S.A. Inc. v. Natural Resources Defense Counsel, Inc., 467 U.S. 837 (1984) 8

Condo v. Sysco Corp., 1 F3d 599, 603 (7th Cir. 1993), *cert. denied*, 510 U.S. 1110 (1994) 8

Herb v. Pitcairn, 324 U.S. 117, 126 (1945) 2

Morill v. Jones, 106 U.S. 466 (1883) 6

NLRB v. Bell Aerospace Co., 416 U.S. 267, 293 (1974) 9

SEC v. Chenery Corp., 332 U.S. 203 (1947) 9

United States v. Gibson-Thomsen Co., Inc., 27 C.C.P.A. 267 (1940) 6

United States v. Haggar Apparel Co., 119 S.Ct. 1392 (1999) 8

Veazie v. Moor, 55 U.S. 568 (1853) 6

Wabash R. Co. v. Pierce, 192 U.S. 179 (1904) 6

Constitutional Provisions

Article I, Section 8, Clause 3 of the U.S. Constitution 6

Other Authorities

H. Rep. No. 1465, 75th Cong., 3d Sess. at 7 5

S. Rep. No. 75-249, 75th Cong., 1st Sess. at 2 (1937) 5

Customs Administrative Bill, Hearings before the Committee on Ways & Means, House of Representatives on H.R. 6738, 75th Cong., 1st Sess. at 46 5

Rules and Regulations

19 C.F.R. Part 102, ... 6

19 C.F.R. § 134.35 8

19 C.F.R. § 134.35(a) 8

Statutes

19 U.S.C. § 66 6

19 U.S.C. § 1304(a) 3, 4, 5, 7

19 U.S.C. § 1304(h) 6

19 U.S.C. § 1624 6

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

In accordance with United States Supreme Court Rule 15.6, petitioner Bestfoods (formerly known as CPC International, Inc.) hereby submits this Reply Brief addressing new points raised in the *Brief for the United States in Opposition* to the petition for a writ of *certiorari* to the United States Court of Appeals for the Federal Circuit.

ARGUMENT

1. The *NAFTA Marking Rules* Applied to Determine Origin Marking Requirements for Goods Produced Domestically Will Affect the Marking of Petitioner's Goods and Will Have a Broad Impact on Administration of the Marking Law.

The government erroneously asserts that the question of whether the "substantial transformation" test should be applied in addition to the NAFTA marking rules "is not properly framed for review here, for a determination of the governing legal standard would not alter the disposition of the substantive controversy." *Brief for the United States in Opposition (Opposition Brief)* at 5. This assertion is directly refuted by the Federal Circuit's opinion, wherein it refused to even consider the question of whether the imported article underwent a substantial transformation:

> Because we conclude that the Treasury Department's tariff-shift regulation is valid, we find it unnecessary to consider whether Customs' ruling would be upheld under the pre-NAFTA standards for determining whether a good has undergone a substantial

transformation after its importation, as held by the Court of International Trade.

Appendix (App.) at 11a-12. While the trial court did order the agency to apply the substantial transformation test, and upheld the agency's determination thereunder, the Federal Circuit vacated that part of the trial court's judgment. In petitioning for a writ of *certiorari*, Bestfoods seeks precisely the determination that the Federal Circuit's decision precludes it from obtaining: whether its goods must be marked as a product of Canada *under the substantial transformation standard.*

The government's reliance on *Herb v. Pitcairn*, 324 U.S. 117, 126 (1945), and its argument that Bestfoods has raised an abstract question that is not framed for review, are both mistaken. The Court in *Herb* considered that an abstract question would be raised "if the same judgment would be rendered by the state court after we corrected its views of federal laws," and "it is manifest that no view we might express of the federal Act would require [the state] courts to proceed to the trial of these actions." By contrast in this case, a decision by the Supreme Court that the substantial transformation standard applies would permit Bestfoods to raise before the Federal Circuit the question of the goods' substantial transformation in the United States. That is the issue the appellate court explicitly refused to address because of its conclusion that the substantial transformation standard was replaced by the NAFTA marking rules, and it is the issue the Federal Circuit would have to consider if Bestfoods appeal to this Court is successful.

2. Congress in 1938 Expressly Denied the Secretary of the Treasury the Power to Define the Scope of Operation of the Marking Law; The *NAFTA Implementation Act* Did Not Restore Such Power.

The government in its opposition repeats the same error that the Federal Circuit committed in its decision: it assumes that the statutory provision in 19 U.S.C. § 1304(a), requiring the marking of "every article of foreign origin," was somehow supplanted by the authorization of NAFTA rules to determine whether certain goods qualify as "goods of a party" for NAFTA purposes. Not only is there nothing in the NAFTA legislation or agreement that allows conflation of these two very different issues, but there is an explicit prohibition against implicit repeals of existing legislation. Bestfoods' petition for a writ of *certiorari* demonstrated that the Federal Circuit disregarded this bar, and the government's response essentially skirts the issue.

Petitioner believes that it has demonstrated the fatal errors in the appellate court's decision. Moreover, the gravity and consequences of those errors warrant review by this Court. The Federal Circuit has allowed an administrative agency to effectively repeal a statutory requirement and replace it with agency rules that were prepared pursuant to a different statutory grant of authority with a different purpose. The Federal Circuit has flouted a clear Congressional admonition against implicit repeals and it has allowed the Secretary to impose a more stringent marking regime on NAFTA articles in direct contravention of the liberalizing purposes of a Free Trade Agreement. For these reasons, this Court should grant the writ and correct the demonstrated errors committed by the Federal Circuit.

A. The government erroneously claims that when Congress, in the *Customs Administrative Act of 1938*, [Act of June 25, 1938, ch. 679, Section 3, 57 Stat. 1077], amended Section 304(a) of the Tariff Act of 1930, 19 U.S.C. § 1304(a), it only intended to modify the power of the Secretary of the Treasury to determine the *how* foreign goods should be marked to show country of origin, and not to deny the Secretary the power to prescribe *whether* a particular article was subject to marking. *Brief in Opposition* at 5-7.

Congressional debates which preceded the enactment of the 1938 Act, however, evidenced clear concern that the Secretary might by regulation determine the *scope* of operation of the marking law:

> Mr. McCORMACK: Under the proposed amendment, you want to make it [marking] discretionary with the Secretary of the Treasury, is that right?
>
> Mr. JOHNSON: No, sir.
>
> Mr. McCORMACK: You start out here and say:
>
> > Under such regulations as the Secretary of the Treasury may prescribe --
>
> Does that not change the mandatory provision and make it a discretionary provision?

> Mr. JOHNSON. No, sir; if there is any question about that, I do not believe there should be any objection to removing any doubt.

See *Customs Administrative Bill, Hearings before the Committee on Ways & Means, House of Representatives on H.R. 6738*, 75th Cong., 1st Sess. at 46. Congress resolved the dispute by removing from Section 304(a) the prefatory phrase "[u]nder such circumstances as the Secretary may by regulation prescribe." The first sentence of Section 304(a) now sets out a clear command: except as provided by statute "every article of foreign origin (or its container . . .) shall be marked in a conspicuous place as legibly, indelibly and permanently as the nature of the article (or container) will permit . . . ." Congress has clearly reserved to itself the power to define the scope of operation of the marking law, including the power to determine when an article is "of foreign origin," and thus subject to marking.

By contrast, the Secretary's authority to make regulations respecting the requirement of marking appears in the second sentence of Section 304(a), and is limited to excepting goods from marking in certain circumstances prescribed by Congress, for example in cases where the article is incapable of being marked, cannot be marked prior to shipment without injury or in cases where "such exceptions can be justified on the basis of administrative experience." See *S. Rep. No. 75-249, 75th Cong., 1st Sess.* at 2 (1937); see also *H. Rep. No. 1465, 75th Cong., 3d Sess.* at 7. The Secretary's rulemaking authority is a limited one, and does not authorize the promulgation of regulations prescribing when a good is "foreign," and subject to marking, and when it is not foreign.

Furthermore, the government errs in suggesting that either 19 U.S.C. § 66, which dates from the Act of February 10, 1820, ch. 11, §§14, 15, 3 Stat. 543, or 19 U.S.C. § 1624, which authorizes the Secretary to issue "General regulations" to carry out the Tariff Act of 1930, empowers the issuance of the regulation at issue in this case, which adapts the *NAFTA Marking Rules,* 19 C.F.R. Part 102, to determining whether articles produced in this country are of "foreign origin," and subject to marking. The former statute, which has not been substantively amended since 1870, was in effect in 1938 when Congress amended the marking statute to limit the Secretary's rulemaking powers thereunder. The latter statute has not been amended since 1930. In any event, it is well-recognized that such general grants of rulemaking authority are ministerial in nature, and authorize the Secretary merely to prescribe the mode or proceedings for carrying into effect what Congress enacted. See *Morill v. Jones*, 106 U.S. 466 (1883); *Campbell v. United States*, 107 U.S. 407 (1883).

Article I, Section 8, Clause 3 of the U.S. Constitution grants the Congress plenary authority to "regulate commerce with foreign nations . . . ." This power extends to the importation of goods and continues until final delivery of the imported articles. *Wabash R. Co. v. Pierce*, 192 U.S. 179 (1904). The question of whether a good produced in the United States is an "article of foreign origin," subject to marking, or subject to "additional duties" for failure to mark under 19 U.S.C. § 1304(h), goes to the heart of Congress' power to regulate foreign commerce. Whether particular activity constitutes "foreign commerce" involves an inquiry concerning whether a transaction is connected with a foreign nation and is extraterritorial, and has always been a matter for ultimate determination by the courts. See *Veazie v. Moor,* 55 U.S. 568 (1853). As noted in *United States v. Gibson-Thomsen Co., Inc.,* 27 C.C.P.A. 267 (1940), there is no basis

to believe that Congress intended to regulate, by requiring marking or assessing marking duties on, new and different articles of commerce, produced in the United States, even if those articles are made in whole or in part from imported materials.

Under these circumstances, it is absurd to assume, as the government does (and as the Federal Circuit did in this case) that Congress intended to delegate to the Secretary the power to determine, *by regulation*, when an article is a "foreign article" subject to marking, much less that such regulations would be entitled to judicial deference.

B. The government misrepresents petitioner's position regarding Congress' power to "determine marking rules for NAFTA goods." *Brief in Opposition* at 8. Petitioner readily acknowledges that Congress authorized the promulgation of *NAFTA Marking Rules*, and their use in determining when an article is a "good of a Party" or a "good of an importing Party," for the purposes set out in NAFTA. Thus, if an article is imported into the United States from Canada or Mexico, the rules may be applied to determine whether the imported article is a "good of a Party."[1]

The issue of when an article produced in the United States is subject to marking under 19 U.S.C. § 1304(a) turns on the separate question of whether it is an "article of foreign origin." The NAFTA Marking Rules do not address this separate issue, nor does the *NAFTA Implementation Act* authorize their use for purposes of making this determination. Because the *NAFTA Implementation Act* contains a special

[1] The NAFTA Marking Rules may also be used to make the separate determination of whether a good is a "good of an importing Party," and thus eligible for the special and additional exception to marking required by NAFTA Annex 311.5(b)(viii).

rule precluding its construction to amend or repeal any other statute by implication, there is no basis for utilizing the NAFTA Marking Rules to define when an a good produced domestically is of "foreign origin."

C. The government errs in suggesting that Customs' regulation (19 C.F.R. § 134.35(a)) applying the NAFTA Marking Rules to the marking of domestically-produced goods is entitled to deference under the rule of *Chevron U.S.A. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), as applied to certain Customs regulations in *United States v. Haggar Apparel Co.*, 119 S.Ct. 1392 (1999). *Chevron* deference simply does not apply in the instant case because Customs did not have the authority to promulgate 19 C.F.R. § 134.35. See *Condo v. Sysco Corp.*, 1 F3d 599, 603 (7th Cir. 1993), *cert. denied*, 510 U.S. 1110 (1994).

Chevron deference would apply only when the Secretary's authority to issue regulations is established. The issue of whether any particular NAFTA Marking Rule is "reasonable" is not presented in this appeal.

Chevron deference does not apply in the instant case as Congress clearly spoke to this issue. In *Chevron U.S.A. Inc. v. Natural Resources Defense Counsel, Inc.*, 467 U.S. 837 (1984), the Court set forth the two questions that need be answered when reviewing an agency's construction of the statute which it administers. "First, *always*, is the question whether Congress has directly spoken to the precise question at issue." *Id.* at 842 (emphasis added). Congress was clear in the NAFTA Implementing Act that nothing in the Act "shall be construed to amend or modify any law of the United States, except as specifically provided therein."

It is implausible to accept, as the government would have it, that Congress intended to have one set of country of origin marking rules for goods imported from non-NAFTA countries and another set of rules for those imports from NAFTA members. Congress did authorize the Secretary of the Treasury to promulgate regulations necessary or appropriate to implement NAFTA. However, Congress was clear in delineating the limit of this authorization to the extent that no regulation shall modify the existing marking rules.

The government's citations to *NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 293 (1974) and *SEC v. Chenery Corp.*, 332 U.S. 203 (1947) are inapposite. While those cases hold that an agency has discretion to determine whether decisions entrusted to shall be made according to general rules or case-by-case determinations, this presupposes that the agency has been granted the authority to promulgate rules in the area at all. Where an agency does not possess such authority, no deference to the substance or form of its rules is required under *Chevron*.

CONCLUSION

The instant petition presents important and continuing issues of law concerning the relationship of NAFTA and its implementing act to pre-existing Federal laws. It also poses significant questions concerning the extent to which regulations adopted by the Secretary of the Treasury may limit or expand Congress' power to regulate foreign commerce. The petition for a writ of *certiorari* should be granted.

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